The Senate

Standing Committee on Regulations and Ordinances

Delegated legislation monitor

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Introduction

Terms of reference

The Senate Standing Committee on Regulations and Ordinances (the committee) was established in 1932. The role of the committee is to examine the technical qualities of all disallowable instruments of delegated legislation and decide whether they comply with the committee's non-partisan scrutiny principles of personal rights and parliamentary propriety.

Senate Standing Order 23(3) requires the committee to scrutinise each instrument referred to it to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for parliamentary enactment.

Nature of the committee's scrutiny

The committee's scrutiny principles capture a wide variety of issues but relate primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments under the *Legislation Act 2003*.[1]

Publications

The committee's usual practice is to table a report, the *Delegated legislation monitor* (the monitor), each sitting week of the Senate. The monitor provides an overview of the committee's scrutiny of disallowable instruments of delegated legislation for the

1 For further information on the disallowance process and the work of the committee see *Odgers' Australian Senate Practice*, 14th Edition (2016), Chapter 15.

preceding period. Disallowable instruments of delegated legislation detailed in the monitor are also listed in the 'Index of instruments' on the committee's website.[2]

Structure of the monitor

The monitor is comprised of the following parts:

- **Chapter 1 New and continuing matters**: identifies disallowable instruments of delegated legislation about which the committee has raised a concern and agreed to write to the relevant minister or instrument-maker:
  - (a) seeking an explanation/information; or
  - (b) seeking further explanation/information subsequent to a response; or
  - (c) on an advice only basis.
- **Chapter 2 Concluded matters**: sets out matters which have been concluded following the receipt of additional information from relevant ministers or instrument-makers, including by the giving of an undertaking to review, amend or remake a given instrument at a future date.
- **Appendix 1 Guidelines on consultation and incorporation of documents**: includes the committee's guidelines on addressing the consultation requirements of the *Legislation Act 2003*[3] and its expectations in relation to instruments that incorporate material by reference.
- **Appendix 2 Correspondence**: contains the correspondence relevant to the matters raised in Chapters 1 and 2.

Acknowledgement

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this monitor.

General information

The Federal Register of Legislation should be consulted for the text of instruments, explanatory statements, and associated information.[4]

The Senate Disallowable Instruments List provides an informal listing of tabled instruments for which disallowance motions may be moved in the Senate.[5]

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2 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Index of instruments*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Index.

3 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015.*

4 See Australian Government, Federal Register of Legislation, www.legislation.gov.au.

The Disallowance Alert records all notices of motion for the disallowance of instruments, and their progress and eventual outcome.[6]

5 Parliament of Australia, *Senate Disallowable Instruments List*, http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_Disallowable_Instruments_List.

6 Parliament of Australia, Senate Standing Committee on Regulations and Ordinances, *Disallowance Alert 2017*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/Alerts.

Chapter 1

New and continuing matters

This chapter details concerns in relation to disallowable instruments of delegated legislation received by the Senate Standing Committee on Regulations and Ordinances (the committee) between 3 February 2017 and 23 February 2017 (new matters); and matters previously raised in relation to which the committee seeks further information (continuing matters).

Response required

The committee requests an explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Instrument	**AD/PHS/10 Amdt 2 - Hydromatic Propeller - Aluminium Blades [F2017L00127]**
Purpose	Repeals and replaces AD/PHS/10 Amdt 1 to allow for Limited Category aircraft administered by the Australian Warbirds Association Ltd (AWAL) to have an extended inspection period to comply with AWAL Maintenance Direction 16-001
Last day to disallow	20 June 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Access to documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement (ES) for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates AWAL Maintenance Direction No: 16-001, as in force from time to time. The ES to the instrument states:

> AWAL Maintenance Direction 16-001 is available by contacting the Australian Warbirds Association Ltd [AWAL] via their website (http://australianwarbirds.com.au/).

However, it is unclear from the ES and the AWAL website whether AWAL Direction 16-001 may be accessed for free.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Instrument	**CASA 11/17 - Direction — conduct of parachute training operations [F2017L00093]**
Purpose	Contains directions relating to aircraft engaged in parachute training operations by organisations that are members of the Australian Skydiving Association Inc.
Last day to disallow	9 May 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)

Access to documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the Australian Skydiving Association (ASA) Operational Regulations approved in writing by CASA from time to time; the ASA Jump Pilot Handbook approved in writing by CASA from time to time and the ASA Training Operations Manual as existing from time to time.

The ES states that these documents are available from ASA; that the instrument only applies to organisations that are members of ASA; and that those organisations have access to those documents. However, the ES does not provide information as to where these documents may be accessed for free by persons other than organisations that are members of ASA.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Instrument	**Insurance (prudential standard) determination No. 1 of 2017 - Prudential Standard GPS 114 Capital Adequacy: Asset Risk Charge [F2017L00101]**
Purpose	Determines Prudential Standard GPS 114 Capital Adequacy: Asset Risk Charge
Last day to disallow	11 May 2017
Authorising legislation	*Insurance Act 1973*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(a)

Drafting

Paragraph 81 of the determination contains a transitional provision that refers to relief granted by the Australian Prudential Regulation Authority (APRA) under the paragraph having effect until no later than December 2014. The committee notes that paragraph 81 appears in the same form in the determination as in the version of the determination being replaced (Insurance (prudential standard) determination No. 4 of 2012 - Prudential Standard GPS 114 - Capital Adequacy: Asset Risk Charge [F2012L02360]). The committee is therefore unable to determine whether paragraph 81 is still operative, or whether the inclusion of paragraph 81 in the current version of the determination is unnecessary.

The committee requests the advice of the minister in relation to the above.

Instrument	**Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089]**
Purpose	Amends the Private Health Insurance (Prostheses) Rules 2016 (No. 4) by correcting errors payable for prostheses in Part A
Last day to disallow	20 June 2017
Authorising legislation	*Private Health Insurance Act 2007*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)

Retrospective commencement

Subsection 12(2) of the *Legislation Act 2003* provides that a provision that commences retrospectively does not apply retrospectively in relation to a person (other than the Commonwealth) if it would disadvantage their rights or impose a liability on the person for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the commencement provision for the Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089] (the amendment rules) provides that they commenced 'immediately after the commencement of the Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4)'. The committee therefore understands the amendment rules to have commenced retrospectively on 8 September 2016.[1] However, the ES to the amendment rules provides no information about the effect of the retrospective commencement on individuals.

The committee requests the advice of the minister in relation to the above.

1 The Private Health Insurance (Prostheses) Amendment Rules 2016 (No. 4) [F2016L01386] commenced immediately after the commencement of the Private Health Insurance (Prostheses) Rules 2016 (No. 3) [F2016L01318], which commenced on 8 September 2016.

Drafting

The amendment rules replace the schedule of listed prostheses currently set out in the Private Health Insurance (Prostheses) Rules 2016 (No. 4) [F2016L01386] (the principal rules). The *Private Health Insurance Act 2007* and the principal rules provide that there must be a benefit for the provision of prostheses listed in the principal rules.

The committee notes that the entry for '13.5.2.5 - Laminoplasty plate' on page 937 of the schedule does not appear to list any prostheses or benefits. The committee understands this omission to be an error in the document, and notes that the amendment rules have since been superseded by the Private Health Insurance (Prostheses) Rules 2017 (No. 1) [F2017L00183], which includes prostheses and benefits under this entry.

However, noting the retrospective commencement of the instrument, the committee is unable to determine whether the omission will have any effect on individuals or bodies involved in the provision of prostheses.

The committee requests the advice of the minister in relation to the above.

Instrument	**Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124]**
Purpose	Amends the *Social Security (International Agreements) Act 1999* to set out the terms of the Agreement on Social Security between the Governments of Australia and New Zealand
Last day to disallow	20 June 2017
Authorising legislation	*Social Security (International Agreements) Act 1999*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

The Social Security (International Agreements) Amendment (New Zealand) Regulations 2017 [F2017L00124] (the regulations) insert a new Schedule 3 to the *Social Security (International Agreements) Act 1999*, which contains the text of the 'Agreement on Social Security between the Government of Australia and the Government of New Zealand' (the agreement). With reference to the above, the committee notes that Article 1 of the agreement contains definitions which rely on the social security law of New Zealand. Article 18 and Part A of the Schedule to the agreement also incorporate the *New Zealand Privacy Act 1993* and New Zealand privacy laws. However, neither the text of the regulations nor the ES expressly states the manner in which this New Zealand legislation is incorporated.

The committee expects instruments (and ideally their accompanying ESs) to clearly state the manner in which documents are incorporated (that is, either as in force from time to time or as in force at the commencement of the legislative instrument). This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Instrument	**Torres Strait Prawn Fishery Management Plan Amendment 2017 [F2017L00120]**
Purpose	Amends the Torres Strait Prawn Fishery Management Plan 2009 to clarify anomalies that have arisen since the original plan was made including allowing for reduction in the total shares in the fishery due to surrendered entitlements and the implementation of vessel monitoring systems
Last day to disallow	20 June 2017
Authorising legislation	*Torres Strait Fisheries Act 1984*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that item 13 of Schedule 1 to the instrument substitutes a new paragraph 5.1(1)(c) into the Torres Strait Prawn Fishery Management Plan 2009 which requires a licensee to 'keep a logbook of the type specified in the current logbook instrument'. However, neither the instrument nor the ES states the manner in which the 'current logbook instrument' is incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Access to incorporated documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates the 'current logbook instrument'. However, the ES does not contain a description of this document, or indicate how the document may be obtained.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Drafting

The committee's usual expectation is that an instrument or its ES identifies the provision of the enabling legislation which authorises the making of the instrument.

The committee notes that the text on the front page of the instrument refers to subsection 33(3A) of the *Acts Interpretation Act 1901* (AIA). However, as the instrument is amending the Torres Strait Prawn Fishery Management Plan 2009, the committee understands the instrument to be relying on subsection 33(3) of the AIA which provides that the power to make an instrument includes the power to vary or revoke the instrument.

The committee draws the above to the minister's attention.

Further response required

The committee requests further explanation or information from relevant ministers or instrument-makers with respect to the following concerns.

Correspondence relating to these matters is included at Appendix 2.

Instrument	**Code for the Tendering and Performance of Building Work 2016 [F2016L01859]**
Purpose	Sets the Australian Government's standards of conduct for all building contractors or building industry participants that seek to be, or are, involved in Commonwealth funded building work
Last day to disallow	9 May 2017
Authorising legislation	*Building and Construction Industry (Improving Productivity) Act 2016*
Department	Employment
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Availability of merits review

The committee commented as follows:

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

With reference to the above, the committee notes that section 18 of the Code for the Tendering and Performance of Building Work 2016 [F2016L01859] (the code) provides for the imposition of exclusion sanctions on an entity that is covered by the code. Exclusion sanction is defined in subsection 3(3) as a period during which a building entity covered by the code is not permitted to tender for, or be awarded, Commonwealth funded building work.

If the ABC Commissioner (the commissioner) is satisfied that a code covered entity has failed to comply with the code, the commissioner may refer the matter to the

minister with recommendations that a sanction should be imposed. If such a matter has been referred to the minister, the minister may impose an exclusion sanction on the entity, or issue a formal warning to the entity that a further failure may result in the imposition of an exclusion sanction.

While section 19 of the code requires the minister to provide written notification of their intention to impose an exclusion sanction, and provides for the entity to make a submission in relation to the proposed sanction, it does not appear that the minister's decision to impose an exclusion sanction is subject to merits review. The ES to the code does not provide information as to whether the decision to impose an exclusion sanction possesses characteristics that would justify the exclusion of such decisions from merits review.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Employment advised:

> Section 19 of the Code protects the integrity of the decision-making process in relation to exclusion sanctions by outlining a number of steps that must be taken before a decision to issue an exclusion sanction is made. It provides that written notice must be given to the code covered entity detailing the alleged breach of the Code and inviting the entity to make a submission in relation to the matter within 21 days. If a submission is made, that submission must be considered before a decision to impose an exclusion sanction is made.
>
> I note that a decision to impose an exclusion sanction would be amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, which is an appropriate review mechanism for these decisions.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that written notice must be given to the code covered entity detailing the alleged breach of the code and inviting the entity to make a submission in relation to the matter within 21 days, and that any submission made must then be considered before a decision to impose an exclusion sanction is made.

The committee also notes the minister's advice that a decision to impose an exclusion sanction would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

However, the minister's response does not provide a justification for excluding merits review of decisions to impose exclusion sanctions on entities that are covered by the code.

The committee draws the minister's attention to the Attorney-General's Department, Administrative Review Council's publication, *What decisions should be subject to merit review?* as providing useful guidance for justifying the exclusion of merits review.[2]

The committee requests the further advice of the minister in relation to the above.

Instrument	**Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796]**
Purpose	Extends export control legislation relevant to plant and plant products to Norfolk Island
Last day to disallow	27 March 2017
Authorising legislation	Export Control (Orders) Regulations 1982
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(b) and (a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Insufficient justification of strict liability offences

The committee commented as follows:

Sections 9 and 13 of Export Control (Plants and Plant Products—Norfolk Island) Order 2016 [F2016L01796] (the order) create strict liability offences of issuing a false certificate and altering a certificate without authorisation. The offences are subject to 50 and 20 penalty units, respectively (currently $9000 and $3600).

Given the potential consequences of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. The committee notes that in this case the ES provides no explanation of or justification for the framing of the offence.

2 Attorney-General's Department, Administrative Review Council, *What decisions should be subject to merit review?* (1999), http://www.arc.ag.gov.au/Publications/Reports/Pages/Downloads/Whatdecisionsshouldbesubjecttomeritreview1999.aspx (accessed 2 March 2017).

The committee draws the minister's attention to the discussion of strict liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,[3] as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Agriculture and Water Resources advised:

> On 1 July 2016 a number of legislative changes came into effect which extended some Commonwealth legislation to Norfolk Island. One of the Acts extended to Norfolk Island was the *Export Control Act 1982*. To support Norfolk Island's $1 million dollar export industry the Export Control (Plants and Plant Products - Norfolk Island) Order 2016 (Norfolk Order) was made under the *Export Control Act 1982* to enable the Department of Agriculture and Water Resources to provide certification for exports of plants and plant exports from Norfolk Island.
>
> In order to provide a consistent export regulatory regime between Australia and Norfolk Island and not give undue advantage, it was considered important to maintain consistency between the Export Control (Plants and Plant Products) Order 2011 (Plant Order) and the Norfolk Order. This includes the strict liability offences in sections 9 and 13, which reflect the strict liability offences outlined in sections 44 and 48 of the Plant Order.
>
> The government considers these provisions are consistent with principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers 2011* (Guide) as the provisions underpin the Australian export regulatory regime, and to a lesser extent, protect general revenue through the export of plants and plant products. The penalties for the offences have been set at 20 penalty units for the offence of altering a certificate in section 13 and 50 penalty units for the offence of issuing a false certificate in section 9. The offences therefore meet the requirement in the Guide that strict liability offences should not exceed 60 penalty units for an individual.
>
> I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments… I have requested that, where possible, the department include additional

3 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 31 January 2017).

information in explanatory statements providing justification for the use of strict liability offences.

Committee's response

The committee thanks the minister for his response.

The committee also thanks the minister for the advice that in the future where instruments impose strict liability offences, the Department of Agriculture and Water Resources will include a justification for the use of such offences in the ESs.

The committee also acknowledges that the penalties for the strict liability offences in the order are consistent with the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

However, while the committee understands the desire to provide a consistent export regulatory regime between Australia and Norfolk Island and to not give undue advantage, the minister's response does not explain the reasons for applying strict liability to the offences of issuing a false certificate and altering a certificate without authorisation.

The committee requests the further advice of the minister in relation to the above.

Incorporation of documents

The committee commented as follows:

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that the definitions of phytosanitary certificate and re-export phytosanitary certificate incorporate the International Plant Protection Convention of the Food and Agriculture Organization of the United Nations (IPPC). However, neither the text of the order, nor the ES, states the manner in which the IPPC is incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Agriculture and Water Resources advised:

> Consistent with subsection 14(1) of the *Legislation Act 2003*, the intention is for references to the International Plant Protection Convention of the Food and Agriculture Organization of the United Nations (IPPC) to be read as in force at a particular time. In this case, the IPPC would be incorporated as at the date that the Export Control (Plants and Plant Products -Norfolk Island) Order 2016 was made (8 November 2016).
>
> I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements addressing the manner in which extrinsic material has been incorporated.

Committee's response

The committee thanks the minister for his response and has concluded its examination of this issue.

The committee also thanks the minister for his advice that in the future the Department of Agriculture and Water Resources will include additional information in ESs to specify the manner in which extrinsic material is incorporated.

Instrument	**Higher Education Provider Approval No. 5 of 2016 [F2016L02008]**
Purpose	Approves Proteus Technologies Pty Ltd as a higher education provider under section 16-25 of the *Higher Education Support Act 2003*
Last day to disallow	9 May 2017
Authorising legislation	*Higher Education Support Act 2003*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 2 of 2017

The committee commented on two matters as follows:

Incorporation of documents

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Other documents may only be incorporated as in force at the commencement of the legislative instrument, unless authorising or other legislation alters the operation of section 14.

With reference to the above, the committee notes that section 5 of Higher Education Provider Approval No. 5 of 2016 [F2016L02008] (the instrument) appears to incorporate the 'Financial Viability Instructions' (FVI). However, neither the text of the instrument nor the ES states the manner in which the FVI are incorporated.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Access to incorporated documents

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

While the committee notes that the FVI are available for free online,[4] neither the instrument nor the ES states exactly where they can be accessed. Where an incorporated document is available for free online, the committee considers that a best-practice approach is for the ES to an instrument to provide details of the website where the document can be accessed.

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4 Australian Government, Department of Education and Training, *Financial Viability Instructions*, https://docs.education.gov.au/documents/financial-viability-instructions (accessed 3 February 2017).

The committee draws the above to the minister's attention.

Minister's response

The Minister for Education and Training advised:

> Section 19-5 of The *Higher Education Support Act 2003* (the Act) requires that an organisation (applicant or approved provider allowed to offer loans under the FEE-HELP scheme) is financially viable and likely to remain financially viable. The FVI informs organisations of the financial information that is required to be submitted, the form in which it must be prepared, and how financial viability will be assessed, thereby assisting them to prepare those parts of their application or annual financial submissions that relate to financial viability.
>
> The instrument incorporates the FVI as part of the standard conditions with which providers are required to comply once approval to offer loans under the FEE-HELP scheme is granted.
>
> I remain committed to ensuring that non-statutory material incorporated by reference is easily ascertainable and that persons interested in, or likely be affected by, the terms of the referenced material can readily identify and access such material. Providing a clear description of the document referred to and specifying where such a document is located supports this important objective. The matters raised by the Committee will be addressed in all future higher education provider approvals.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that the issues raised will be addressed in future instruments.

However, the minister's response does not address the manner of incorporation of the FVI. In addition, the committee's expectation is for the instrument or its accompanying ES to specify where the FVI can be obtained, in accordance with paragraph 15J(2)(c) of the *Legislation Act 2003*.

The committee requests the further advice of the minister in relation to the above.

Instrument	**Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756]**
Purpose	Provides safety protections and navigation requirements for the Jervis Bay Territory similar to those applicable in NSW waters under the marine safety legislative regime established by the New South Wales *Marine Safety Act 1998*
Last day to disallow	20 March 2017
Authorising legislation	*Jervis Bay Territory Acceptance Act 1915*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a), (b) and (d)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Matter more appropriate for parliamentary enactment

The committee commented as follows:

The Jervis Bay Territory Marine Safety Ordinance 2016 [F2016L01756] (the ordinance) creates a number of offences that carry terms of up to 20 months imprisonment or impose penalties of up to 100 penalty units (currently $18 000).[5]

The committee notes that the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) states that regulations should not be authorised to impose fines exceeding 50 penalty units or create offences that are punishable by imprisonment. The Guide further notes:

> Almost all Commonwealth Acts enacted in recent years that authorise the creation of offences in subordinate legislation have specified the maximum

5 See Section 19: Offence of operating an unsafe vessel (Penalty: Imprisonment for 20 months or 100 penalty units, or both); Section 24: Offence of reckless or negligent operation of a vessel (Penalty: Imprisonment for 10 months or 50 penalty units, or both); Section 32: Offence of climbing etc. onto a vessel (Penalty: 100 penalty units); Section 36: Offence of interfering etc. with lightships and navigation aids (Penalty: 100 penalty units); Section 59: Offence of middle range prescribed concentration of alcohol (Penalty: Imprisonment for 6 months or 30 penalty units, or both); Section 60: Offence of high range prescribed concentration of alcohol (Penalty: Imprisonment for 10 months or 50 penalty units, or both); and Section 113: Offence of breaching a condition of an exemption (Penalty: 60 penalty units).

> penalty that may be imposed as 50 penalty units or less. Penalties of imprisonment have not been authorised.[6]

The ES to the ordinance, while acknowledging these statements in the Guide, states:

> The primary policy goal of the Ordinance is to provide a similar level of protection of vessel owners, operators and other people in JBT [Jervis Bay Territory] waters, to that already enjoyed by people in the adjoining NSW waters. It is desirable for a person to be subject to a comparable penalty for an offence committed in JBT waters as for the same offence committed a few kilometres away in NSW waters. Consequently, in some instances in the Ordinance, consistent with NSW legislation, penalties of greater than 50 penalty units or penalties involving terms of imprisonment are imposed.
>
> The scope of the Ordinance-making power in section 4F of the Acceptance Act is very broad (Ordinances may be made for the peace, order and good government of the Territory) and it may have been a Parliamentary intention that Ordinances be the primary vehicle of legislating for the JBT. Finally, other JBT Ordinances contain offence provisions, some with penalties including terms of imprisonment (see, for example, the Jervis Bay Territory Emergency Management Ordinance 2015, section 24).
>
> In each instance in the Ordinance, where a penalty involves a term of imprisonment or a penalty of greater than 50 penalty units, the description of the section in the Explanatory Statement notes the comparable provision in NSW legislation that the penalty is based. The Attorney-General's Department was consulted in relation to penalties during the development of the Ordinance.

The committee acknowledges that the ordinance-making power in the *Jervis Bay Territory Acceptance Act 1915* (Acceptance Act) is broad in scope. However, it does not consider that the information provided in the ES adequately justifies the imposition of terms of imprisonment in the absence of an express power to do so. In this regard, the committee notes advice received from the Office of Parliamentary Counsel in 2014 that:

> [t]he types of provisions…that should be included in regulations include provisions dealing with offences and powers of arrest, detention, entry, search or seizure. Such provisions are not authorised by a general rule-making power (*or a general regulation-making power*). If such provisions are required for an Act that includes only a general rule-making power,

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6 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016).

> *it would be necessary to amend the Act to include a regulation-making power that expressly authorises the provisions*.[7] (emphasis added)

The committee further notes that, while other JBT ordinances contain offence provisions, the primary source of offence provisions for the JBT (and of laws for the JBT generally) appears to be laws of the Australian Capital Territory, by virtue of section 4A of the Acceptance Act. Noting that the Acceptance Act was enacted in 1915, the committee is interested in whether there is now a need for offences carrying terms of imprisonment to be created specifically for the JBT; and whether consideration should be given to amending the Acceptance Act to do so directly or to provide an express power to authorise the inclusion of such provisions in JBT ordinances.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Local Government and Territories advised:

> As a general comment, I note that Ordinances made for the external territories and the Jervis Bay Territory (JBT) are quite unlike other types of delegated legislation at the Commonwealth level. Such Ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation. Consequently, deviation from strict compliance with Commonwealth guidance framed in the context of general Commonwealth-level delegated legislation is in some cases justifiable.
>
> Having considered this matter in some detail, at this time I do not think it is necessary to amend the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act). I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide more robust justifications in relation to the matters mentioned by the Committee. My response is enclosed.
>
> Reference Sections: 19, 24, 32, 36, 59, 60, 113
>
> The Jervis Bay Territory (JBT) is a Commonwealth administered territory that has no state legislature. Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) provides that the laws (including the principles and rules of common law and equity) in force in the ACT are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Act, in force in the JBT as if

7 See, *Delegated legislation monitor* 6 of 2014, pp 18 and 69 (response received from the First Parliamentary Counsel in relation to Australian Jobs (Australian Industry Participation) Rule 2014).

the JBT formed part of the ACT. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, which are subject to the scrutiny of the ACT legislature (and apply to the JBT without Commonwealth parliamentary scrutiny).

Section 4F of the Acceptance Act empowers the Governor-General to 'make Ordinances for the peace, order and good government of the Territory'.

In contrast, the Delegated Legislation Monitor (which in turn refers to advice received from the Office of Parliamentary Counsel (OPC) in 2014) refers to a 'general regulation-making power'. As noted in the OPC advice, a 'general regulation-making power' is one that authorises the making of regulations 'required or permitted' or 'necessary or convenient' (see paras 9 to 18 of *Drafting Direction No.3.8-Subordinate Legislation* (DD3.8), which is referred to in the 2014 advice from OPC). Such a law-making power is different in scope from the power to make laws 'for the peace, order and good government' of a territory. The latter is not aptly described as a 'general regulation-making power' as that term is used in the Delegated Legislation Monitor, the 2014 OPC advice or DD3.8. Instead, a power granted in these terms is a plenary power. Although some limits apply to such a power, a grant of power in these terms includes the power to prescribe offences that are punishable by imprisonment.

Ordinances are made by the Governor-General under section 4F of the Acceptance Act to complement the ACT laws that are applied in the JBT (which mainly pertain to state or local government-type issues). Such Ordinances are generally made to account for the JBT's unique legal and administrative arrangements or to address matters, which may not be dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the proximity of the JBT to NSW.

In practice, the Ordinance-making power under the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three are modelled on NSW legislation (which include offence provisions).

In relation to the Marine Ordinance, the ACT does not have a coastal marine environment to regulate so there is no ACT coastal marine law that applies in the JBT. The policy goal behind the making of the Marine Ordinance is to put in place a legal regime covering use of the JBT marine environment similar to that applying across the JBT-NSW maritime border. The Marine Ordinance offence provisions and penalties mirror those in the *Marine Safety Act 1998* (NSW). The *Marine Safety Act 1998*, including its penalty provisions, were scrutinised by the elected NSW legislature.

Other recent JBT Ordinances have been made which mirror NSW legislation, namely the Jervis Bay Territory Rural Fires Ordinance 2013 and the Jervis Bay Territory Emergency Management Ordinance 2015. These

> Ordinances also replicate the offence provisions in the mirrored NSW legislation, and carry penalties of imprisonment.
>
> In summary, JBT Ordinances generally apply state-type law and are a rarely used tool. Offence provisions and penalties mirror NSW requirements to provide similar protections on both sides of a contiguous border. Penalties of imprisonment are exceptional, and engaged only for the most serious offences including endangering life. The *Marine Safety Act 1998* (NSW) was scrutinised by the elected NSW legislature.
>
> For the reasons set out above, I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more rigorous justification for the provisions of the Ordinance that provide for penalties in excess of 50 penalty units and or terms of imprisonment.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions of the ordinance mirror NSW legislation. While the committee understands the desire to provide similar protection on both sides of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the provisions of the ordinance that provide for penalties in excess of 50 penalty units and/or terms of imprisonment. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that the inclusion of such penalties is not a matter that is more appropriate for parliamentary enactment.

The committee requests the further advice of the minister in relation to the above.

Insufficient information regarding strict liability offences

The committee commented as follows:

The ordinance creates three strict liability offences:

- Subsection 87(6) creates a strict liability offence for failing: to show, or demonstrate to a police officer the operation of, machinery or equipment on a vessel; to give a police officer your name, residential address, date of birth or evidence of your identity; or, where a police officer boards a vessel, to stop or manoeuvre the vessel as required by the police officer;

- Subsection 105(4) creates a strict liability offence for failing to take reasonable steps to facilitate a police officer to board a vessel; and
- Section 113 creates a strict liability offence for breaching a condition of an exemption under sections 111 or 112 of the Ordinance.

The first two offences carry penalties of 50 penalty units (currently $9000), and the offence under section 113 carries a penalty of 60 penalty units (currently $10 800). Each of the offences allows a defence of honest and reasonable mistake of fact to be raised.

With respect to these offences, the ES to the ordinance states:

> Failing to assist the police by not demonstrating the operation of equipment, identifying oneself, or manoeuvring a vessel as directed, may hinder the police in their ability to enforce the Ordinance, and may compromise the safety of the person, the police officer or the public. For this reason, this offence has been prescribed as a strict liability offence…
>
> The offence applies if a person does not provide a safe and practicable way for police to board the vessel. If boarding of the vessel is not facilitated, police will be unable to carry out their duty to enforce compliance with the Ordinance, which is why the offence has been prescribed as a strict liability offence…
>
> Breaching a condition could compromise public safety, or the safety of individuals on a vessel, which is why this offence has been designated as a strict liability offence. People operating a vessel under a conditional exemption are placed on notice to avoid breaching any condition of that exemption.

Given the potential consequences of strict liability offence provisions for the defendant, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. While the ES establishes why offences are needed to protect public and individual safety and to enable police to enforce compliance with the ordinance, the ES does not provide sufficient detail to justify the framing of the offences as strict liability offences. In this respect, the committee notes the following guidance in relation to framing strict liability offences contained in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers* (the Guide):

> Application of strict or absolute liability to *all* physical elements of an offence is generally only considered appropriate where all of the following apply.
>
> - The offence is not punishable by imprisonment.
> - The offence is punishable by a fine of up to:
>   - 60 penalty units for an individual (300 for a body corporate) in the case of strict liability, or

  - 10 penalty units for an individual (50 for a body corporate) in the case of absolute liability.

- The punishment of offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring certain conduct.
- There are legitimate grounds for penalising persons lacking fault; for example, because he or she will be placed on notice to guard against the possibility of any contravention. If imposing absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact.[8]

The committee considers that the ES has not justified how the framing of these offences as strict liability offences is likely to enhance the effectiveness of the enforcement regime under the ordinance in deterring certain conduct or is otherwise appropriate. Further, in respect of the offences under subsections 87(6) and 105(4), the ES has not demonstrated that there are legitimate grounds for penalising persons lacking fault.

The committee draws the minister's attention to the discussion of strict liability offences in the Guide as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for for Local Government and Territories advised:

> Subsections: 87(6) and 105(4) and section 113
>
> I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more comprehensive justification for the three strict liability offence created by these sections, addressing the matters set out in, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide). As noted above, these justifications are that:
>
> - the Marine Ordinance is a state-type law;
> - JBT has a contiguous border with NSW;
> - strict liability provisions mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring

8 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016).

the same legal regime applies on either side of a contiguous marine border between the JBT and NSW;

- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that the strict liability provisions of the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of strict liability offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the strict liability offence provisions of the ordinance. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that these offences do not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

The committee requests the further advice of the minister in relation to the above.

Evidential burdens of proof on the defendant

The committee commented as follows:

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the onus of proof for persons in the their individual capacities, this infringement on well-established and fundamental personal legal rights is justified.

Subsections 15(2); 28(2); 30(8); 41(2); 47(4); 71(1) and (2); 87(7); and 105(5) of the ordinance provide for a number of defences against liability to offences relating to operating a vessel without a current boat driving licence; contravening a safe loading requirement; keeping all parts of the body within a vessel while underway; unauthorised use of an emergency patrol signal; lifejacket requirements; failure to comply with a direction relating to the conduct of person; failure to comply with

monitoring powers relating to vessels and premises; and non-complaince with the requirement to facilitate boarding.

Sections 108 and 110 also provide exemptions from liability to various offences in the ordinance for certain activities and for persons assisting Australian Defence Force or the naval, military or air forces of another country.

In relation to the above provisions the defendant will bear the evidential burden in relation to the matters to make out the defences and exemptions.[9]

While the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter) rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the burden of proof to be justified. The ES to the ordinance does not explicitly address the reversal of the evidential burden of proof.

The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the ES explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[10]

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for for Local Government and Territories advised:

> Sections: 108 and 110 and subsections 15(2); 28(2); 41(2); 47(4); 71(1) and (2); and 105(5)
>
> I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the reversal of the burden of proof contained in each of the provisions above, addressing the matters set out in the Guide each of the detailed sections. As noted above the justifications are that:
>
> - the Marine Ordinance is a state-type law;
> - JBT has a contiguous border with NSW;

9 Subsection 13.3(3) of the *Criminal Code* provides: A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

10 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016), pp 50-52.

- Offence provisions reversing the evidentiary burden of proof mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side the contiguous marine border between the JBT and NSW;
- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions reversing the evidentiary burden of proof in the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the offence provisions in the ordinance that reverse the evidentiary burden of proof. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that these offences do not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

The committee requests the further advice of the minister in relation to the above.

Legal burden of proof on the defendant

The committee commented as follows:

Scrutiny principle 23(3)(b) of the committee's terms of reference requires the committee to ensure that an instrument does not unduly trespass on personal rights and liberties. This principle requires the committee to ensure that where instruments reverse the onus of proof for persons in the their individual capacities, this infringement on well-established and fundamental personal legal rights is justified.

Section 56 of the ordinance makes it an offence for a person under the age of 18 to either operate a vessel in Territory waters or supervise a junior operator, where there is present in his or her breath or blood the youth range prescribed concentration of alcohol. Section 63 makes it a defence for this offence if the

defendant proves that, at the time the defendant was operating a vessel or supervising a juvenile operator of the vessel, the presence of alcohol in the defendant's breath or blood of the youth was not caused (in whole or in part) by either the consumption of an alcoholic beverage (other than for religious observance) or consumption or use of any other substance (such as food or medicine) for the purpose of consuming alcohol. This reverses the legal burden of proof applying to the section 56 offence.[11]

The ES to the ordinance provides that:

> [t]he religious or medicinal consumption of alcohol is likely to be exclusively within the knowledge of the defendant, and thus it would be unworkable if the prosecution bore the legal burden in relation to this.
>
> It is appropriate that the defendant bears the legal burden in relation to this defence because of the potentially significant risks to public safety posed by a person affected by alcohol who is in charge of a vessel.

The committee considers that the ES provides a justification for reversing the evidential burden of proof (i.e. that the matters are peculiarly in the knowledge of the defendant). The committee also understands the justification for creating an offence to reduce the risks to public safety posed by people affected by alcohol in charge of vessels.

However, while the committee considers that it may be appropriate to require a defendant to *raise evidence* about matters relevant to the defence set out in section 63 (the evidential burden), the committee considers that the ES does not provide a justification for requiring the defendant to *positively prove* matters relevant to this defence (the legal burden).

The committee's consideration of the appropriateness of a provision which reverses the legal burden of proof is assisted if the ES explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[12]

The committee requests the advice of the minister in relation to the above.

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11 Section 13.4 of the *Criminal Code* provides: A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly: (a) specifies that the burden of proof in relation to the matter in question is a legal burden; or (b) requires the defendant to prove the matter; or (c) creates a presumption that the matter exists unless the contrary is proved.

12 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 16 November 2016), pp 50-52.

Minister's response

The Minister for for Local Government and Territories advised:

> Sections 56 and 63
>
> I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the section 63 requirement for defendants to positively prove the matters set out in that section. As noted above, these justifications are that:
>
> - the Marine Ordinance is a state-type law;
> - JBT has a contiguous border with NSW;
> - offence provisions and penalties mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side of the contiguous marine border between the JBT and NSW;
> - the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
> - the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that the offence provisions and penalties in the ordinance mirror NSW legislation. While the committee understands the desire to ensure the same legal regime applies on either side of a contiguous border, the scrutiny of such provisions by the NSW legislature does not provide sufficient assurance that the provisions meet this committee's expectations with respect to the inclusion of offence provisions in Commonwealth delegated legislation.

The committee also notes the minister's undertaking to amend the ES to provide a justification for the reversal of the legal burden of proof that applies to a section 56 offence under the ordinance. However, as the minister's response does not provide information about the content of this justification, the committee is unable to conclude that this offence does not unduly trespass on personal rights and liberties in accordance with its scrutiny principle 23(3)(b).

The committee requests the further advice of the minister in relation to the above.

Unclear definition

The committee commented as follows:

Section 92 of the ordinance provides that persons may assist police officers in exercising powers or functions or duties under Part 9. These include boarding a vessel, requiring a master of a vessel to answer questions, sampling, and securing or seizing things found using monitoring powers in relation to a vessel. 'Persons assisting police officers' is not defined outside of section 92. In this regard, the ES states:

> This section provides that persons may assist police officers in the execution of their duties, if it is necessary and reasonable. Someone who helps a police officer in the exercise of their functions and duties is called a 'person assisting' the police officer. Powers exercised, or functions or duties performed by persons assisting, in accordance with the directions of a police officer, are taken to have been exercised or performed by the police officer.

However, it appears unclear to the committee:

a) whether the class of persons who may assist police officers is limited in any way;

b) whether the exemptions for police officers that are provided for in sections 109 and 110 would also apply to 'persons assisting police officers';

c) whether the conduct of 'persons assisting police officers' can be questioned in the same manner as the conduct of police officers; and

d) how these provisions would operate if 'persons assisting police officers' acted not in accordance with the directions of the police officer.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for for Local Government and Territories advised:

> Section 92
>
> I note the matters raised by the Committee and I have asked my Department to amend the explanatory statement for the Marine Ordinance to clarify:
>
> - whether the class of person who may assist police officers is limited in any way;
> - if the exemptions for police officers that are provided for in sections 109 and 110 apply to persons assisting police officers;

- whether the conduct of persons assisting police officers can be questioned in the same manner as the conduct of police officers; and
- how these provisions would operate if 'persons assisting police officers' acted not in accordance with the directions of the police officers.

Committee's response

The committee thanks the minister for her response.

However, while the committee notes the minister's undertaking to amend the ES to the ordinance to clarify the committee's initial queries, the minister's response does not provide any information to clarify the matters raised by the committee.

The committee requests the further advice of the minister in relation to the above.

Access to documents

The committee commented as follows:

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that subparagraph 21(2)(b)(i) of the ordinance incorporates Australian Standard AS 1799.1-2009, as in force at the commencement of the ordinance. However, neither the text of the ordinance nor the ES indicates how AS 1799.1-2009 may be freely obtained.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for for Local Government and Territories advised:

Subparagraph 21(2)(b)(i)

Australian Standard AS1799.1-2009 Small Crafts Part One (AS1799.1-2009), sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in overall length when used as recreational vessels. Australian Standard AS1799.1-2009 is readily available, but at a cost to the public.

Vessels cannot be registered in the JBT and they must meet the registration conditions set in their home state. Due to the proximity of NSW, the majority of vessels using JBT waters are likely to be registered in NSW. Further, it is likely that most vessels operating in JBT waters will traverse NSW regulated waters. In order to be registered and/or operate in NSW waters vessel operators must comply with regulation 13 of the Marine Safety Regulations 2016 (NSW), which makes similar provision, to section 21 of the Marine Ordinance.

Section 21 of the Marine Ordinance prohibits a vessel operating in JBT waters from having a motor that exceeds the appropriate power rating for the vessel. In most cases, the appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified (or the specification is not apparent) and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799.1-2009.

Noting the comments above, I have instructed my Department to paraphrase this response to address the Guide's requirement to include incorporated documents in the Explanatory Statement.

Committee's response

The committee thanks the minister for her response.

The committee notes the minister's advice that the Australian Standard incorporated into the ordinance is readily available, but at a cost to the public.

In this regard, the committee reiterates its concerns about the incorporation of documents where there is a cost to access the material. Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently,

the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[13] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the further advice of the minister in relation to the above.

Instrument	**Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809]** **Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897]**
Purpose	Amends the Migration Regulations 1994 to introduce a new statutory review process; and amends the Legislation (Exemptions and Other Matters) Regulation 2015 to insert new exemptions from the sunsetting and disallowance schemes under the *Legislation Act 2003*
Last day to disallow	28 March 2017; 9 May 2017
Authorising legislation	*Migration Act 1958*; *Legislation Act 2003*
Department	Immigration and Border Protection; Attorney-General's
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Exemption from sunsetting

The committee commented as follows:

Migration Amendment (Review of the Regulations) Regulation 2016 [F2016L01809] (review regulation) amends the Migration Regulations 1994 (Migration Regulations)

13 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3 (accessed 2 March 2017).

to introduce a new statutory review process. The process requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations and to:

- commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
- commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.

The ES to the review regulation states:

> The purpose of the review requirement is to ensure that the Migration Regulations are kept up to date and provisions are in force for so long as they are needed. In this way, the Regulation provides a rigorous integrity measure to ensure the Migration Regulations are examined, and determined fit for purpose, on a regular and ongoing basis. Specifically, this ensures that the Migration Regulations remain subject to ongoing monitoring for their impact and relevance, while also benefitting from appropriate deregulation, including the removal of unnecessary, confusing or outdated provisions.

Item 10 of the Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016 [F2016L01897] (exemption regulation) amends the Legislation (Exemptions and Other Matters) Regulation 2015 to exempt the Migration Regulations from the sunsetting scheme under the *Legislation Act 2003*.

The committee notes that pursuant to section 50 of the *Legislation Act 2003*, but for the exemption regulation, the Migration Regulations would have been required to be re-made due to sunsetting on or before 1 October 2018.

The ES for the amending regulation states:

> The Migration Regulations contain an alternative statutory review mechanism inserted by the Migration Amendment (Review of the Regulations) Regulation 2016, which requires the Department of Immigration and Border Protection to conduct periodic reviews of the Migration Regulations, including to:
>
> - commence the initial review within one year after 1 July 2017 and finish it within two years after the day the review begins; and
> - commence a subsequent review every 10 years after 1 October 2017 and finish each review within two years after commencement of the review.
>
> For this reason, it is appropriate to provide an exemption from sunsetting for the Migration Regulations.

Neither the ES to the review regulation nor the exemption regulation provides information on the broader justification for the exemption of the Migration Regulations from sunsetting.

The committee also notes that the process to review and action review recommendations for instruments can be lengthy, and the committee expects departments and agencies to plan for sunsetting well in advance of an instrument's sunset date.[14]

The committee is concerned that neither the ES to the review regulation nor the exemption regulation provides information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

The committee requests the advice of the minister in relation to the above.

Attorney-General's response

The Attorney-General advised:

> The Committee has sought further advice on the broader justification for the exemption of the Migration Regulations 1994 from sunsetting and information about the review process for the Migration Regulations.
>
> The purpose of the sunsetting regime established by the *Legislation Act 2003* is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.
>
> The Legislation Act does not specify any conditions or legal criteria that I am required to consider in granting a sunsetting exemption. However, there is a long standing principle that sunsetting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. This principle is underpinned by five criteria:
>
> - the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
> - the instrument is designed to be enduring and not subject to regular review;
> - commercial certainty would be undermined by sunsetting;
> - the instrument is part of an intergovernmental scheme; and
> - the instrument is subject to a more rigorous statutory review process.

14 Attorney-General's Department, *Guide to Managing Sunsetting of Legislative Instruments* (April 2014), https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Documents/guide-to-managing-sunsetting-of-legislative-instruments-april2014.doc (accessed 2 February 2016).

> I am satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed. It enables the objectives of the Legislation Act to be met without incurring the significant systems, training and operational costs associated with remaking the Migration Regulations.
>
> The Committee has also sought information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.
>
> I am advised by the Minister for Immigration and Border Protection that the Department has not commenced the review. According to regulation 5.44A of the Migration Regulations, the review is now to commence between 1 July 2017 and 30 June 2018.
>
> Considering the width and breadth of the Migration Regulations, which currently consists of 1478 pages, these timeframes for the initial review were put in place to ensure that adequate resources and time are allocated.
>
> The Committee may be interested to know that the Migration Regulations are amended numerous times each year to update policy settings for the Australian immigration programmes. This has been the case since the Migration Regulations commenced in September 1994. Redundant provisions were removed from the Migration Regulations in 2012. The amendment history of the Migration Regulations is set out in the endnotes and now runs to more than 400 pages.

Committee's response

The committee thanks the Attorney-General for his response.

The committee notes the advice of the Attorney-General and Minister for Immigration and Border Protection that the Department of Immigration and Border Protection has not commenced the review, and that timeframes for the initial review under the new process were put in place to ensure that adequate resources and time are allocated. However, the Attorney-General's response does not provide information as to why, in effect, an additional year is required to conduct the initial review under the new process, noting that the sunsetting date for the Migration Regulations would have been 1 October 2018.

Recognising that the process to review and action review recommendations for instruments can be lengthy, the committee reiterates its expectation that departments and agencies plan for sunsetting well in advance of an instrument's sunset date. The committee remains concerned that the effect of the introduction of the new process for review of the Migration Regulations is that the timeframes set in place by the sunsetting regime under the *Legislation Act 2003* are avoided.

The committee requests the further advice of the ministers in relation to the above.

Instrument	**Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016 [F2016L01970]**
Purpose	Sets out the procedures to be applied in allocating spectrum licences in the residual 700 MHz band and fixes the access charges payable by persons who are allocated such licences
Last day to disallow	9 May 2017
Authorising legislation	*Radiocommunications Act 1992*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Sub-delegation

The committee commented as follows:

Section 23 of the determination requires the Australian Communications and Media Authority (ACMA) to appoint an 'auction manager' to manage the auction of spectrum licences in the residual 700 MHz Band. Section 91 of the determination enables the auction manager to delegate any of their functions and powers under the determination.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

In this respect, the committee notes that there is no apparent limit on the category of people to whom the auction manager's functions and powers can be delegated; and the ES does not provide a justification for the broad delegation of the auction manager's functions and powers under the determination.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Communications advised:

> The ACMA has provided me with advice in relation to the Committee's concerns. It is the ACMA's practice to appoint an ACMA employee as the auction manager, and it is the practice of the auction manager to delegate their powers only to ACMA employees or members, who are subject to the *Public Service Act 1999*. The auction manager is appointed as a principal point of contact for applicants and bidders in the auction process, and as a principal person responsible for the conduct of the auction.
>
> The auction manager performs several functions and powers under the Determination which are procedural or mechanistic, and are necessary for the timely, orderly and efficient conduct of the auction. The Determination sets out the processes that the auction manager must adhere to in conducting the auction, including setting the start date and time for the first and second rounds of the auction or cancelling the auction in exceptional circumstances. If the auction manager were taken ill during the auction, subsequent rounds or processes could not take place in the absence of delegated functions and powers. As it is not possible to predict when a substitute auction manager will be required, the ACMA has not limited the powers which may be delegated to a substitute auction manager.

Committee's response

The committee thanks the minister for his response.

The committee notes the minister's advice that it is the practice of the auction manager to delegate their powers only to ACMA employees or members, who are subject to the *Public Service Act 1999*, and that, if the auction manager were taken ill during the auction, subsequent rounds or processes could not take place in the absence of delegated functions and powers.

However, it remains unclear to the committee why it is necessary for there to be such a broad delegation of the auction manager's powers under the determination. While the committee also notes the minister's advice that the powers which may be delegated have not been limited as it is not possible to predict when a substitute auction manager will be required, the committee reiterates its expectations that, generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

The committee requests the further advice of the minister in relation to the above.

Advice only

The committee draws the following matters to the attention of relevant ministers or instrument-makers on an advice only basis.

Instrument	**Plant Health Australia (Plant Industries) Funding Repeal Determination 2016 [F2017L00109]**
Purpose	Repeals the Plant Health Australia (Plant Industries) Funding Determination 2015. The repeal is required annually because each year PHA advises the correct proportions of the annual membership contribution
Last day to disallow	13 June 2017
Authorising legislation	*Plant Health Australia (Plant Industries) Funding Act 2002*
Department	Agriculture and Water Resources
Scrutiny principle	Standing Order 23(3)(a)

Description of consultation

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for this determination states:

> PHA has advised the proportions for each relevant PHA plant product for 2016-17 and requested that the Plant Health Australia (Plant Industries) Funding Repeal Determination 2015 be repealed. The proportions for each relevant PHA plant product for 2016-17 are set out in the Plant Health Australia (Plant Industries) Funding Determination 2016.
>
> The Office of Best Practice Regulation (OBPR) has been consulted and has advised that a Regulatory Impact Statement is not required (OBPR Reference Number 21017 refers).

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*.

The committee's guideline on consultation also states:

> It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met.

In terms of complying with paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003*, the committee's preferred approach would be for the ES to have explicitly stated that further consultation for the determination was considered unnecessary (or inappropriate), if this is the case.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee draws the above to the minister's attention.

Instrument	**Telecommunications (Carrier Licence Charges) Act 1997 - Determination under paragraph 15(1)(d) No. 1 of 2017 [F2017L00145]**
Purpose	Sets out the amount determined to be the estimated total amount of grants likely to be made during the financial year under section 593 of the *Telecommunications Act 1997*
Last day to disallow	20 June 2017
Authorising legislation	*Telecommunications (Carrier Licence Charges) Act 1997*
Department	Communications and the Arts
Scrutiny principle	Standing Order 23(3)(a)

Drafting

This instrument does not contain a provision which specifies when the instrument is to commence. The committee therefore understands the instrument to rely on paragraph 12(1)(a) of the *Legislation Act 2003* which provides that a legislative

instrument commences at the start of the day after the day the instrument is registered on the Federal Register of Legislation. This instrument was registered on 9 February 2017.

The committee's preference is for instruments that rely on paragraph 12(1)(a) of the *Legislation Act 2003* to identify the relevance of this provision in their ESs to ensure readers may understand when an instrument commences without the need to have expert knowledge or consult extrinsic material.

The committee draws the above to the minister's attention.

Multiple instruments that appear to rely on section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*)

Instruments	CASA 11/17 - Direction — conduct of parachute training operations [F2017L00093] National Health (Multiple Hospitals Paperless Claiming Trial) Special Arrangement 2017 (PB 14 of 2017) [F2017L00141]
Scrutiny principle	Standing Order 23(3)(a)

Incorporation of Commonwealth disallowable legislative instruments

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time.

The instruments identified above incorporate Commonwealth disallowable legislative instruments. However, neither the text of the instruments nor their accompanying ESs state the manner in which they are incorporated.

The committee acknowledges that section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

However, the committee expects instruments to clearly state the manner of incorporation (that is, either as in force from time to time or as in force at a particular time) of external documents, including other legislative instruments. This enables persons interested in or affected by an instrument to understand its operation, without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

The committee therefore considers that, notwithstanding the operation of section 10 of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*), and in the interests of promoting clarity and intelligibility of an instrument to persons interested in or affected by an instrument, instruments (and ideally their accompanying ESs) should clearly state the manner in which Commonwealth disallowable legislative instruments are incorporated.

The committee draws the above to the attention of ministers.

Multiple instruments that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*

Instruments	CASA EX10/17 - Exemption — alignment line at primary parking position (operators of certified aerodromes) [F2017L00091] Norfolk Island Legislation Amendment (Pathology Transitional) Amendment (Cessation Date) Rule 2017 [F2017L00137] Norfolk Island Legislation Amendment (Diagnostic Imaging Transitional) Amendment (Cessation Date) Rule 2017 [F2017L00138] Plant Health Australia (Plant Industries) Funding Repeal Determination 2016 [F2017L00109] Private Health Insurance (Prostheses) Amendment Rules 2017 (No. 1) [F2017L00089] Sanctions Amendment (Appointment of Administrators and Advisers) Principles 2017 [F2017L00114]
Scrutiny principle	Standing Order 23(3)(a)

Drafting

The instruments identified above appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the *Acts Interpretation Act 1901* is relevant:**

> Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[15]

The committee draws the above to the attention of ministers.

15 For more extensive comment on this issue, see *Delegated legislation monitor* 8 of 2013, p. 511.

Chapter 2

Concluded matters

This chapter sets out matters which have been concluded following the receipt of additional information from relevant ministers or instrument-makers.

Correspondence relating to these matters is included at Appendix 2.

Instrument	**AD/BEECH 300/8 Amdt 3 - Wing Attach Fittings, Bolts and Nuts [F2016L01906]**
Purpose	Clarifies the version of the Beechcraft Structural Inspection and Repair Manual that is to be complied with
Last day to disallow	9 May 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Access to incorporated documents

The committee commented as follows:

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the explanatory statement (ES) for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that AD/BEECH 300/8 Amdt 3 - Wing Attach Fittings, Bolts and Nuts [F2016L01906] (the instrument) incorporates, as in force at 5 December 2016, sections of Beechcraft Structural Inspection and Repair Manual 98-39006 (manual). The ES to the instrument states that the manual may be obtained directly from Beechcraft via its website.

While the committee notes that the instrument has been made in response to previous concerns it raised with respect to access to the incorporated manual,[1] the committee remains concerned about this issue as it appears that the manual can only be obtained for a fee and the ES does not provide information about whether it can otherwise be accessed for free by persons interested in or affected by the instrument.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Infrastructure and Transport advised:

> CASA [the Civil Aviation Safety Authority] incorporates requirements by reference to reduce the length and complexity of instruments and where there is no value in paraphrasing or reproducing the incorporated material. Examples of documents that CASA instruments incorporate by reference include foreign or privately owned airworthiness standards, standards for non-aviation specific matters (e.g. standards for standard parts like nuts and bolts) that are administered [by] Australian Standards or other standards bodies, CASA policy documents, documents produced by manufacturers of aircraft and operational documents of particular operators. These standards are selected because they promote the safe conduct of the relevant aviation activities. Wherever possible CASA uses freely available standards.
>
> In some cases, CASA may incorporate a purchasable standard as an alternative to a freely available standard, providing choice. If CASA did not provide that choice, then the purchasable standard would not be able to be used to comply with aviation safety requirements even if a person wished to use it…
>
> In other cases, particularly in relation to older aircraft no longer supported by the original manufacturer, there are only standards made available for a fee from the manufacturer.
>
> These standards are required in order for those aircraft to remain safe. CASA has no resources to develop its own standards for such aircraft, nor funding to purchase the standards in a way that enables CASA to make the standard freely available. The alternative is for the aircraft to cease to meet safety requirements and to be grounded. In other cases a standard may relate to a matter that is not aviation-specific...
>
> CASA recognises the importance of the principle of the free availability of legal requirements, including matters such as standards that might be

1 See *Delegated legislation monitors* 8 and 9 of 2016.

> incorporated into law by reference. However, CASA has a limited role in influencing either policy or the law on the issue, particularly in relation to foreign and non-aviation specific standards. For its part, however, CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard in appropriate circumstances.
>
> At the same time, CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available. To do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

In concluding, the committee notes the minister's advice that CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available; and that to do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

The committee also notes the minister's advice that CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[2] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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2 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

Instrument	**AD/GAS/1 Amdt 12 - Inspection, Test and Retirement [F2016L01941]**
Purpose	Repeals and replaces AD/GAS/1 Amdt 11 to specify what versions of incorporated documents must be used
Last day to disallow	9 May 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Access to incorporated documents

The committee commented as follows:

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates, as in force from time to time, AS 2030 and paragraph 10.2.2 of AS2337.1-2004. The ES for the instrument states:

> Australian Standard 2337.1-2004 (and other Australian Standards) are available for purchase from various suppliers, including SAI Global (from their website: https://www.saiglobal.com).

While the committee notes that the instrument has been made in response to previous concerns it raised with respect to access to incorporated documents,[3] the committee remains concerned about this issue, as it appears that AS 2030 and AS2337.1-2004 can only be obtained for a fee and the ES does not provide

3 See *Delegated legislation monitors* 7 and 8 of 2016.

information about whether these standards can otherwise be accessed for free by persons interested in or affected by the instruments.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Infrastructure and Transport advised:

> CASA [the Civil Aviation Safety Authority] incorporates requirements by reference to reduce the length and complexity of instruments and where there is no value in paraphrasing or reproducing the incorporated material. Examples of documents that CASA instruments incorporate by reference include foreign or privately owned airworthiness standards, standards for non-aviation specific matters (e.g. standards for standard parts like nuts and bolts) that are administered [by] Australian Standards or other standards bodies, CASA policy documents, documents produced by manufacturers of aircraft and operational documents of particular operators. These standards are selected because they promote the safe conduct of the relevant aviation activities. Wherever possible CASA uses freely available standards.
>
> In some cases, CASA may incorporate a purchasable standard as an alternative to a freely available standard, providing choice. If CASA did not provide that choice, then the purchasable standard would not be able to be used to comply with aviation safety requirements even if a person wished to use it.
>
> In other cases, particularly in relation to older aircraft no longer supported by the original manufacturer, there are only standards made available for a fee from the manufacturer.
>
> These standards are required in order for those aircraft to remain safe. CASA has no resources to develop its own standards for such aircraft, nor funding to purchase the standards in a way that enables CASA to make the standard freely available. The alternative is for the aircraft to cease to meet safety requirements and to be grounded. In other cases a standard may relate to a matter that is not aviation-specific. For example, Airworthiness Directive AS/GAS/1 Arndt 12 incorporates by reference Australian Standard 2337.1-2004 relating to the inspection of gas cylinders. There is no aviation-specific standard for this matter and CASA considers that there would be no value in CASA developing such a standard unless aviation-specific risks needed to be addressed. CASA has no expertise in such matters, which are better considered by persons outside the aviation industry. In order to ensure that gas cylinders used in aviation applications are safe, CASA has adopted the Australian Standard and to CASA's knowledge, there is no freely available standard for the same matter.

> CASA recognises the importance of the principle of the free availability of legal requirements, including matters such as standards that might be incorporated into law by reference. However, CASA has a limited role in influencing either policy or the law on the issue, particularly in relation to foreign and non-aviation specific standards. For its part, however, CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard in appropriate circumstances.
>
> At the same time, CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available. To do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

In concluding, the committee notes the minister's advice that CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available; and that to do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

The committee also notes the minister's advice that CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[4] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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4 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

Instrument	**Airports Amendment (Airport Sites) Regulation 2016 [F2016L01810]**
Purpose	Amends the descriptions of airport sites in the Airports Regulations 1997 to reflect changes in State and Territory land title registers for all federal leased airports
Last day to disallow	28 March 2017
Authorising legislation	*Airports Act 1996*
Department	Infrastructure and Transport
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the regulation provides the following information:

> Section 161(1) of the Act [*Airports Act 1996*] provides as follows: 'If there is an airport lease relating to an airport site for an airport, the Governor General must not make any regulations varying the site unless the lessee has given written consent to the making of those regulations.' This consent, where required, has been obtained.

While the committee does not interpret paragraphs 15J(2)(d) and (e) of the *Legislation Act 2003* as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In the committee's view, the general statement that, where required under enabling legislation, consent to the making of regulations has been obtained, is not sufficient to meet the requirement that the ES describe the nature of any consultation undertaken.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's response

The Minister for Infrastructure and Transport advised:

> The Committee was concerned that the Explanatory Statement (ES) for the instrument failed to adequately explain the nature of consultation undertaken.
>
> The Department of Infrastructure and Regional Development has advised consultation was undertaken with all Airport Lessee Companies (ALCs) through written correspondence. Each ALC responded to a request from the Department providing their consent to the amendment or questions about the list of proposed airport site variations, which were addressed prior to their consent being given.
>
> The ES will be updated to include information on the nature of consultation that was undertaken and registered as soon as practicable.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes the minister's undertaking to update the ES to describe the nature of consultation that was undertaken.

Instrument	**Amendment of List of Exempt Native Specimens (11/01/2017) [F2017L00045]**
Purpose	Amends the List of Exempt Native Specimens to exclude Nautilidae from the mollusc exemption
Last day to disallow	9 May 2017
Authorising legislation	*Environment Protection and Biodiversity Conservation Act 1999*
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 2 of 2017

No description of consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The explanatory statement (ES) which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for Amendment of List of Exempt Native Specimens (11/01/2017) [F2017L00045] (the instrument) provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's response

The Minister for the Environment and Energy advised:

> Nautilidae was listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) following the Conference of the Parties to the Convention, at its 17th meeting, held in Johannesburg, South Africa (24 September to 4 October 2016).
>
> Prior to the Conference of the Parties, the Delegate of the then Minister for the Environment consulted the relevant Commonwealth, State and Territory fisheries agencies and commercial fishing industries and

associations, commercial shell traders, and homewares and retail industry on the proposed listing of Nautilidae under CITES.

Specimens listed under CITES are not generally included in the List of Exempt Native Specimens (LENS), therefore the amendment of the entry to remove Nautilidae from the LENS is required as a consequence of its listing under CITES.

As the amendment to the LENS is administrative in nature and the relevant stakeholders had already been consulted about the proposed listing of Nautilidae under CITES, no additional consultation was conducted for this amendment to the LENS.

A corrected explanatory statement has now been prepared (a copy is at Attachment A) that accurately reflects the consultation that occurred, and will be lodged on the Federal Register of Legislation.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes the minister's undertaking to register the updated ES, which describes the nature of consultation that was undertaken, on the Federal Register of Legislation.

Instrument	**CASA EX166/16 - Exemption—use of radiocommunication system in firefighting operations (Victoria) [F2016L01793]**
Purpose	Exempts persons on board an aircraft performing firefighting services on behalf of the Victorian Government and the Country Fire Authority of Victoria from the requirement to be qualified to transmit on radio frequencies used for ensuring air navigation safety
Last day to disallow	27 March 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for the instrument provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's response

The Minister for Infrastructure and Transport advised:

> The Committee noted that the ES for the instrument failed to provide information regarding the nature of consultation undertaken. CASA has advised that the consultation section was inadvertently omitted and a replacement ES has now been registered which includes the information on consultation.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes that a replacement ES which addresses the committee's concerns regarding consultation has been registered on the Federal Register of Legislation. The description of consultation states:

> The instrument has been issued at the request of DEWLP [Victorian Government Department of Environment, Land, Water and Planning] and is required for firefighting operations. As the instrument is similar to instruments that have previously been issued to DEWLP for the same purposes, and DEWLP has not sought any changes to the substance of the instrument, CASA understands that the instrument is acceptable to DEWLP. In this situation, CASA is of the view that further consultation is not necessary or appropriate.

Instrument	**CASA EX183/16 - Exemption - provision of a wind direction indicator [F2016L02022]**
Purpose	Exempts aerodrome operators from compliance with the requirement to have a wind direction indicator near the end or ends of a runway used in instrument non-precision approach operations
Last day to disallow	9 May 2017
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 2 of 2017

Consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for CASA EX183/16 - Exemption - provision of a wind direction indicator [F2016L02022] (the instrument) provides no information regarding consultation.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's response

The Minister for the Infrastructure and Transport advised:

> I am advised by the Civil Aviation Safety Authority (CASA) that in response to concerns raised by the Standing Committee regarding similar instruments in the *Delegated legislation monitor* 1 of 2017, CASA subsequently identified that both EX183/16 and EX10/17 also required consultation statements to be included in their respective Explanatory

> Statements. I understand that replacement Explanatory Statements for each of these instruments including this information were registered on the Federal Register of Legislation on 15 February 2017.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes that a replacement ES that addresses the committee's concerns regarding consultation has been registered on the Federal Register of Legislation. The description of consultation states:

> This instrument reissues an earlier general exemption that expired on 30 November 2016. The earlier exemption was made in response to requests from several aerodrome operators in respect of specific aerodromes. Rather than issue individual exemptions to those aerodrome operators, CASA issued a general exemption to all operators of certified and registered aerodromes. No issues have been raised by industry in relation to the earlier exemption.
>
> The provisions of the earlier instrument and the current instrument are beneficial to aerodrome operators, and also relieve individual aerodrome operators of the need to apply for, and pay fees associated with, individual exemptions for the aerodromes that they operate. In these circumstances, CASA believes that no further consultation is necessary or appropriate.

Instrument	**Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment Regulation 2016 [F2016L01829]**
Purpose	Amends the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 to give effect to United Nations Security Council Resolution 2270 (2016)
Last day to disallow	30 March 2017
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Insufficient information regarding strict liability offences

The committee commented as follows:

Regulation 11B creates offences for engaging in sanctioned commercial activity. Strict liability applies to the elements of the offences that the sanctioned commercial activity is not an authorised commercial activity.

Regulation 11C creates offences relating to holding a bank account. Strict liability applies to the elements of the offences that the minister has directed the person, by written notice, to close the bank account.

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857] designates regulations 11B and 11C as UN sanction enforcement laws. This means that contravention of these regulations is punishable by up to ten years imprisonment and/or a fine of up to 2500 penalty units (currently $450 000).[5]

With respect to these offences, the ES to the regulation states:

> The Regulation provides for strict liability in new Regulation 11B and new Regulation 11D. However, in effect this means that strict liability applies to the existence or otherwise of a permit or a notice from the Minister, respectively. It does not apply to any other elements of the offences. This is appropriate because either the permit (or notice) exists or it does not exist.

The committee notes that, as drafted, Regulation 11D does not appear to create a strict liability offence.

Given the potential consequences of strict liability offence provisions, the committee generally requires a detailed justification for the inclusion of any such offences in delegated legislation. The committee notes that in respect of the above offences the ES provides only a brief justification for the framing of the offences.

The committee also draws the minister's attention to the discussion of strict liability offences in the Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers*,[6] as providing useful guidance for justifying the use of strict liability offences in accordance with the committee's scrutiny principles.

The committee requests the advice of the minister in relation to the above.

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5 See the combined effect of the Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857], which designates certain regulations of the Charter of the United Nations (Sanctions—Democratic People's Republic of Korea) Amendment Regulation 2016 [F2016L01829] as UN Sanction Enforcement Laws under section 2B of the *Charter of the United Nations Act 1945*, read with section 27 of that Act which makes contravention of a UN sanction enforcement law a criminal offence.

6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx (accessed 31 January 2017).

Minister's response

The Minister for Foreign Affairs advised:

Reference to Regulation 11D in the ES

I would like to clarify that the reference to 'Regulation 11D' referred to by the Committee should have been a reference to 'Regulation 11C'. I will amend the ES accordingly as soon as practicable.

Regulation 11B – Strict Liability

I note that strict liability does not apply to all of the elements of the offence. Rather, it only applies to the circumstance that the 'sanctioned commercial activity' was not an 'authorised commercial activity'. As stated in Note 2 to Regulation 11B(4), '[a] sanctioned commercial activity is not an authorised commercial activity if it is not carried out in accordance with a permit under regulation 14G'. The strict liability therefore effectively applies to the circumstance of a relevant permit not existing.

The Attorney-General's Department publication entitled *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that 'Applying strict … liability to a particular physical element of an offence may be justified where … [r]equiring proof of fault of the particular element … would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element'.

In the case of the circumstance of a 'sanctioned commercial activity' not being an 'authorised commercial activity', it would not be appropriate to have to prove:

- Intention i.e. that the person believed that the 'sanctioned commercial activity' was not an 'authorised commercial activity' – this would be very difficult to show unless the person accused of the offence confessed to believing that the 'sanctioned commercial activity' was not an 'authorised commercial activity' (i.e. that no relevant permit existed) at the relevant time;
- Knowledge i.e. that the person was aware that the 'sanctioned commercial activity' was not an 'authorised commercial activity' – again, this would be very difficult to show unless the person accused of the offence confessed to being aware that the 'sanctioned commercial activity' was not an 'authorised commercial activity' (i.e. that no relevant permit existed) at the relevant time;
- Recklessness i.e. that the person was aware of a substantial risk that the 'sanctioned commercial activity' was not an 'authorised commercial activity' and, having regard to the circumstances known to him or her, it was unjustifiable to take the risk – in the context of this offence, there is no justification for undertaking a 'sanctioned commercial activity' without a

permit. Rather, if there is no relevant permit then the 'sanctioned commercial activity' should not occur; or

- Negligence i.e. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the 'sanctioned commercial activity' was not an 'authorised commercial activity', that the conduct merits criminal punishment – again, in the context of this offence, there is no justification (or 'standard of care') for undertaking a 'sanctioned commercial activity' without a relevant permit. Rather, if there is no relevant permit then the 'sanctioned commercial activity' should not occur.

There are thus legitimate grounds for penalising persons lacking 'fault' in respect of the element of a 'sanctioned commercial activity' not being an 'authorised commercial activity' i.e. that no relevant permit existed. As set out in the ES, the relevant question is only whether or not a permit exists. Requiring the additional proof of a 'fault' element would be very difficult in the absence of a confession (in the cases of 'intention' and 'knowledge') or would be inappropriate (in the cases of 'recklessness' and 'negligence').

In addition, introducing a 'fault' element to this element of the offence would appear to require that the person be aware of the detailed operation of the underlying law in order to be found to have committed an offence. This would make it extremely difficult to enforce the law and would make the law ineffective, particularly in the case of persons who were not aware of the relevant law or the precise manner in which it operated. Ignorance of the law should not be an excuse for undertaking an activity without a relevant permit. The burden should be on the person wishing to undertake the sanctioned commercial activity to be aware of the law and to comply with it.

Regulation 11C – Strict Liability

I note that strict liability does not apply to all of the elements of the offence. Rather, it only applies to the circumstance of whether the Minister has directed the person to close a bank account by a written notice under regulation 8B. The strict liability therefore effectively applies to the circumstance of a relevant notice existing. The Attorney-General's Department publication entitled *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that 'Applying strict … liability to a particular physical element of an offence may be justified where … [r]equiring proof of fault of the particular element … would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element'.

In the case of the circumstance of the existence of a written notice under regulation 8B, it would not be appropriate to have to prove:

- Intention i.e. that the person believed that there was a written notice under regulation 8B – this could be difficult to show unless the person accused of the offence confessed to believing that there was a written notice under regulation 8B at the relevant time;
- Knowledge i.e. that the person was aware that there was a written notice under regulation 8B – again, this could be difficult to show unless the person accused of the offence confessed to being aware that there was a written notice under regulation 8B at the relevant time;
- Recklessness i.e. that the person was aware of a substantial risk that there was a written notice under regulation 8B and, having regard to the circumstances known to him or her, it was unjustifiable to take the risk – in the context of this offence, there is no justification for failing to comply with a notice. Rather, if there is a notice to close the bank account then the account should be closed; or
- Negligence i.e. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that there was a written notice under regulation 8B, that the conduct merits criminal punishment – again, in the context of this offence, there is no justification (or 'standard of care') for failing to comply with a notice. Rather, if there is a notice to close the bank account then the account should be closed.

In addition, a person who has been directed to close a bank account by a written notice under Regulation 8B is effectively put ‘on notice’ by the direction. The person has received sufficient notice of this obligation and has the opportunity to avoid unintentional contravention.

Thus, there are legitimate grounds for penalising persons lacking 'fault' in respect of the element of a relevant notice existing. As set out in the ES, the relevant question is only whether or not a notice exists. Requiring the additional proof of a 'fault' element should not be required.

I also note that strict liability allows a defence of honest and reasonable mistake of fact to be raised. Thus, an offence will not be committed if a person makes a reasonable and honest mistake as to a permit under regulation 14G not existing or the existence of a written notice under regulation 8B.

Finally, I would advise that the use of strict liability in respect of elements of offences under Australia’s sanctions laws is not unusual. Attached is a table detailing where elements of offences under Australia’s sanctions laws are subject to strict liability.

Committee's response

The committee thanks the minister for her detailed response and has concluded its examination of the instrument.

The committee notes the minister's undertaking to amend the ES to correctly refer to the strict liability offences in 'Regulation 11C' instead of 'Regulation 11D'.

Instrument	**Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857]**
Purpose	Amends the Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 to reflect the making of the Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2016 [F2016L01829]
Last day to disallow	9 May 2017
Authorising legislation	*Charter of the United Nations Act 1945*
Department	Foreign Affairs and Trade
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Drafting

The committee commented as follows:

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2) [F2016L01857] (the amendment declaration) replaces Schedule 1 of Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008 [F2016C00782] (the principal declaration) to specify provisions of Commonwealth laws that are UN sanction enforcement laws pursuant to the *Charter of the United Nations Act 1945*.

The committee previously requested advice from the minister in relation to the apparent inclusion of repealed regulations in this Schedule.[7] The minister's response advised that these regulations should not appear in the principal declaration, and undertook to amend the declaration and its ES, as soon as practicable, to remove the

7 See *Delegated legislation monitors* 6 and 8 of 2016.

references to the UN sanction enforcement laws which no longer exist.[8] However, the committee notes that the repealed regulations are included in the replacement Schedule 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Foreign Affairs advised:

> UN Security Council (UNSC) Resolution 2153 (2014) removed the blanket prohibition on the importation of rough diamonds from Cote d'Ivoire. Regulation 4N of the *Customs (Prohibited Imports) Regulations 1956* which imposed the prohibition was repealed following the adoption of Resolution 2153 (2014). UNSC Resolution 2283 (2016) terminated the remaining UN sanctions on Cote d'Ivoire. Thus, in accordance with section 8 of the *Charter of the United Nations Act* 1945, Australia's domestic regulations giving effect to these sanctions – the *Charter of the United Nations (Sanctions – Cote d'Ivoire) Regulations 2008* – ceased to have effect.
>
> I have now amended the Declaration and its ES to reflect the repeal of regulation 4N of the *Customs (Prohibited Imports) Regulations 1956* and the ceasing of effect of the *Charter of the United Nations (Sanctions – Cote d'Ivoire) Regulations 2008*.

Committee's response

The committee thanks the minister for her response and has concluded its examination of the instrument.

In concluding, the committee notes that Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2017 (No. 1) [F2017L00200] (amendment declaration 2017) has been registered on the Federal Register of Legislation and received by the committee. The amendment declaration 2017 reflects the repeal of regulation 4N of the Customs (Prohibited Imports) Regulations 1956 and the ceasing of effect of the Charter of the United Nations (Sanctions – Cote d'Ivoire) Regulations 2008.

8 Regulation 11 of Charter of the United Nations (Sanctions — Côte d'Ivoire) Regulations 2008; and regulation 4N of Customs (Prohibited Imports) Regulations 1956 no longer exist.

Instrument	**Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01904]**
Purpose	Allows the Commonwealth to charge fees for performing functions relating to certain international travellers using gateway airports in a special processing area
Last day to disallow	9 May 2017
Authorising legislation	*Customs Act 1901*; *Migration Act 1958*
Department	Immigration and Border Protection
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Unclear basis for determining fees

The committee commented as follows:

The Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 [F2016L01904] (the regulation) allows the Commonwealth to make an agreement with an international airport operator, international airline, and/or a ground handling operator relating to the amount and payment of fees for the provision of priority border clearance services.

With respect to the payment of fees for the provision of such services, the ES to the regulation states:

> New subregulation 5.41C(1) provides that if, at the request of a person, the Secretary of the Department of Immigration arranges for a statutory function to be performed in a special processing area for the performance of the function at a gateway airport, and in relation to one or more international travellers using the gateway airport, the person must pay the Commonwealth an agreed fee in respect of the performance of the statutory function and any other statutory functions in relation to those international travellers.
>
> A note clarifies that an agreed fee in respect of the performance of the statutory function and other statutory functions may be paid in anticipation of the performance of the function.

With respect to the agreements relating to the amount and payment of fees for the provision of such services, the ES to the regulation states:

> New subregulation 5.41C(2) provides that, on behalf of the Commonwealth, the Secretary of the Department of Immigration may make, with a person making a request described in subregulation 5.41C(1),

> an agreement relating to the amount and payment of a fee that is or will be payable under subregulation 5.41C(1).

The committee also notes that the regulation impact statement (RIS), attached to the ES, states:

> Fixed term contracts ensure that the Government can recover the cost of services it provides and that airport operators can reliably offer premium services to international travellers without impacting on existing traveller facilitation rates. This will allow airport operators to develop products which could be marketed to airlines to streamline and enhance their traveller experience during arrival in and departure from Australia.

However, notwithstanding the above discussion in the RIS about government being able to recover the cost of services it provides pursuant to the regulation, it is unclear to the committee whether the basis for the agreed fees will, in fact, reasonably reflect the cost of providing the service.

It is also unclear from the text of the regulation and its ES whether the agreed fees for the provision of priority border clearance services will be set by legislative instrument or otherwise made publically available.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Immigration and Border Protection advised:

> In response to the first question I can confirm that the fees involved in the Regulation will reasonably reflect the cost of providing the service to international travellers who request this service.
>
> A value-based pricing model will apply to the provision of this service, consistent with the Australian Government Charging Framework. The specific fees involved will be established through individual agreements with each service provider offering the service to their passengers. The service provider will then charge passengers who request the service on an opt-in, voluntary basis. Only passengers who choose to use the service will be required to pay this fee. The general public will not be subject to the charge unless they choose to use the premium service offered by industry.
>
> Capital and set up costs for this service will be borne by service providers. The fees charged by the Department will assist the Department to recover costs for managing and administering the service and recruiting, training and deploying officers and equipment required to process passengers, without adversely affecting existing border clearance and passenger processing activities.
>
> In response to the second question I confirm that the fees for this service will not be set by legislative instrument. The government will enter into

contractual agreements with industry service providers that define the service commitment, pricing, minimum term, payment terms and method.

Contracts will be negotiated on a case-by-case basis with each airport operator, as service demand is determined by industry and the associated costs involved are identified by government. Commercial charges will be set and administered consistent with the Australian Government Charging Framework. These agreements will not be publicly available as they will be subject to commercial-in-confidence classification.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016 [F2016L01576]**
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Agriculture and Water Resources
Last day to disallow	30 March 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* 8 of 2016

Addition of matters to Schedule 1AB of the Financial Framework (Supplementary Powers) Regulations 1997 (constitutional authority for expenditure)

The committee commented as follows:

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 2*,[9] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016 [F2016L01576] (the regulation) adds two new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending in relation to these items. New table item 172 establishes legislative authority for the Commonwealth government to provide a one-off payment to Dairy Australia Limited (Dairy Australia) to assist Dairy Australia to expand delivery of its existing Tactics for Tight Times (TFTT) program.

The objective of the TFTT program is:

> To provide funding to Dairy Australia Limited for the provision of information, services and activities to assist dairy farmers in dealing with challenging conditions in the dairy market.
>
> This objective also has the effect it would have if it were limited to providing assistance:
>
> (a) for activities relating to trade and commerce with other countries, or among the States and Territories; or
>
> (b) in or in relation to a Territory; or
>
> (c) to meet Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights, particularly Article 11; or
>
> (d) for measures that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation; or
>
> (e) through the delivery of information and services online.

The ES for the regulation identified the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the trade and commerce power (section 51(i));
> - the external affairs power (section 51(xxix));

9 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

- the communications power (section 51(v));
- the Commonwealth executive power (section 61); and
- the territories power (section 122).

The regulation thus appears to rely on the trade and commerce power, the external affairs power, the communications powers, the Commonwealth executive power and the territories power as the relevant heads of legislative power to authorise the addition of the items to Schedule 1AB (and therefore the spending of public money under them).

However, it is unclear to the committee how each of the consitutional heads of power relied on supports the funding of the TFTT program, and the ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

The committee requests the advice of the minister in relation to this matter.

Minister's response

The Minister for Finance, on behalf of the Minister for Agriculture and Water Resources, advised:

> The development of this program and the drafting of item 172 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations was undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objectives of the item reference a number of heads of legislative power, namely:
>
> - the trade and commerce power;
> - the territories power;
> - the external affairs power;
> - the Commonwealth executive power; and
> - the communications power.
>
> The objective of the item refers, in particular, to Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights, particularly Article 11. Article 11(2)(a) provides for state parties, recognising the fundamental right of everyone to be free from hunger, to take measures which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, and by developing or reforming agrarian systems.
>
> The Commonwealth has provided a one-off payment of $900,000 to Dairy Australia Limited (Dairy Australia) to expand its delivery of the Tactics for Tight Times program (TFTT) as part of the Government's Dairy Support Package. The Dairy Support Package received bipartisan support

and was an important and timely response to address immediate issues impacting dairy farmers as a result of retrospective price cuts by Murray Goulburn and Fonterra.

The TFTT program provides a range of tools, including information and one-on-one advice, to dairy farmers affected by the drop in farm gate milk price.

The funding is providing information, services and activities to assist dairy farmers dealing with challenging conditions in the dairy market.

The TFTT program will assist dairy farmers to continue to produce dairy products, including products which are produced for interstate sale or for export from Australia.

The program supports dairy farmers in south eastern Australia and is available to farmers whether they are located in states or territories.

The program involves the dissemination of information to dairy farmers, including scientific and technical knowledge, which is designed to assist them in improving methods of production and their output.

Providing timely assistance to help maintain a viable dairy industry, in light of challenging conditions, benefits the nation as a whole. Dairy is Australia's third largest rural industry. Approximately 38,000 people are directly employed in the industry, including 6,100 dairy farmers. The TFTT program supports these farmers.

To ensure the information relevant to the TFTT program is communicated broadly and appropriately, dairy farmers have access to a range of online communications resources such as factsheets, case studies, videos and other online communications tools through the Dairy Australia website.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Committee's response

The committee thanks the ministers for their response and has concluded its examination of the instrument.

In concluding, the committee notes that the regulation seeks to rely on the trade and commerce power; the territories power; the external affairs power; the Commonwealth executive power; and the communications power as the relevant heads of legislative power to authorise the funding of the TFTT program, and that the minister's response has articulated clear links between the program and the first three of these heads of power. While the minister's response also usefully includes detailed information about the different elements of the program, to assist with the scrutiny process, the committee's preference is that such details about new

programs and the ways in which programs are supported by Commonwealth heads of legislative power are included in the ES to a regulation.

In concluding, the committee also notes the minister's advice that '[t]his answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.'

The committee takes this opportunity to note that any claims to withhold information from Senate committees require the minister to 'state recognised public interest grounds for any claim to withhold the information' that can be considered by the committee and the Senate.

With respect to claims that legal professional privilege provides grounds for a refusal to provide information in a parliamentary forum, Odgers' Australian Senate Practice states:

> It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for refusal of information in a parliamentary forum.
>
> …the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.[10]

The committee draws the above to the minister's attention.

10 *Odgers' Australian Senate Practice*, 14th Edition (2016), pp 668-669.

Instrument	**Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672]**[11]
Purpose	Amends Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 to establish legislative authority for spending activities administered by the Department of Industry, Innovation and Science
Last day to disallow	21 November 2016
Authorising legislation	*Financial Framework (Supplementary Powers) Act 1997*
Department	Finance
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitors* 8 of 2016 and 2 of 2017

Constitutional authority for expenditure

The committee commented as follows:

Scrutiny principle 23(3)(a) of the committee's terms of reference requires the committee to ensure that an instrument is made in accordance with statute. This principle requires that instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements.

The committee notes that, in *Williams No. 2*,[12] the High Court confirmed that a constitutional head of power is required to support Commonwealth spending programs. As such, the committee requires that the ES for all instruments specifying programs for the purposes of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* explicitly state, for each new program, the constitutional authority for the expenditure.

The Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016 [F2016L00672] (the regulation) adds three new items to Part 4 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations 1997 (FFSP Regulations) to establish legislative authority for spending in relation to these items. New table item 159 establishes

11 The committee notes that it deferred consideration of this instrument in *Delegated legislation monitors* 6 and 7 of 2016.

12 *Williams v Commonwealth* (No. 2) (2014) 252 CLR 416.

legislative authority for the Commonwealth government to fund the National Science Week and strategic science communication activities.

The committee notes that the objective of the 'National Science Week and strategic science communication activities' initiative is to fund a broad range of activities that are part of National Science Week, and which seek to enhance the community's understanding of, and interest in, science, technology, engineering and mathematics. The regulation provides that the objectives of the scheme also have the effect they would have if they were limited to providing funding in relation to eleven purposes tied to a Constitutional head of power. The ES for the regulation identifies the constitutional basis for expenditure in relation to this initiative as follows:

> Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:
>
> - the trade and commerce power (section 51(i));
> - the communications power (section 51(v));
> - the astronomical and meteorological observations power (section 51(viii));
> - the statistics power (section 51(xi));
> - the power to make special laws for people of any race (section 51(xxvi));
> - the external affairs power (section 51(xxix));
> - the power to make grants to the States (section 96);
> - the Territories power (section 122); and
> - the Commonwealth executive power and the express incidental power (section 61 and section 51(xxxix)).

The committee notes that the objective of the National Science Week initiative, when read in conjunction with the constitutional authority set out in the regulation, appears to be drafted in a manner similar to 'severability provisions' in primary legislation. Severability provisions are designed to prompt the High Court to read down operative provisions of general application which are held to exceed the available heads of legislative power under the Constitution.

Severability provisions operate in conjunction with section 15A of the *Acts Interpretation Act 1901*, which provides that Acts shall be read and construed so as not to exceed the legislative power of the Commonwealth. Section 13(1)(a) of the *Legislation Act 2003* applies section 15A of the *Acts Interpretation Act 1901* to legislative instruments.

With respect to section 15A of the *Acts Interpretation Act 1901*, the committee notes that the Office of Parliamentary Counsel, Drafting Direction No. 3.1 on constitutional law issues, provides the following guidance for drafting severability provisions:

> Section 15A does not mean that a provision drafted without regard to the extent of Commonwealth legislative power will be valid in so far as it happens to apply to the subject matter of a particular power. The High Court has held that section 15A is subject to limitations. To be effective, a severability provision must overcome those limitations.[13]

Noting that section 15A is subject to limitations, the committee's consideration of legislative instruments that appear to rely on the ability of a court to read down provisions must involve an assessment of the effectiveness of any severability or reading down provisions to enable a legislative instrument to operate within available heads of legislative power.

Drafting Direction 3.1 also provides the following example of one of the limitations of section 15A:

> …if there are a number of possible ways of reading down a provision of general application, it will not be so read down unless the Parliament indicates which supporting heads of legislative power it is relying on. For a discussion of this limitation, see *Pidoto v. Victoria* (1943) 68 CLR 87 at 108-110 and *Strickland v. Rocla Concrete Pipes Ltd* (1971) 124 CLR 468. The Concrete Pipes case concerned a severability provision which was held to be ineffective because the list of supporting heads of legislative power did not exhaust the purported operation of the operative provision in question.[14]

With reference to the committee's ability to effectively undertake its scrutiny of regulations adding items to Part 4 of Schedule 1AB to the FFSP Regulations, the committee notes its preference that an ES to a regulation include a clear statement of the relevance and operation of each constitutional head of power relied on to support a program or initiative.

In this respect it is unclear to the committee how each of the constitutional heads of power relied on in the regulation supports the funding for the National Science Week initiative, and the ES to the regulation does not provide any further information about the relevance and operation of each of the constitutional heads of power relied on to support the program.

The committee requests the advice of the minister in relation to this matter.

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13 Australian Government, Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 29 September 2016), p. 9.

14 Australian Government, Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues*, https://www.opc.gov.au/about/docs/drafting_series/DD3.1.pdf (accessed 29 September 2016), p. 9.

Minister's first response

The Minister for Finance, on behalf of the then Minister for Industry, Innovation and Science the Hon Greg Hunt MP and with the endorsement of the current minister, Senator the Hon Arthur Sinodinos, advised:

> National Science Week is Australia's preeminent national celebration of science, held annually in August. It provides high profile science engagement across the nation, in which the whole of the Australian community can participate. It aims to reach as many Australians as possible - and has reached more than 1.5 million people each year - with a positive message about the impact science has on our lives, the Australian economy, our nation's society, and on the rest of the world. It is also an important opportunity for the Australian science community to celebrate and showcase science to the Australian public and the rest of the world.
>
> The Australian Government supports National Science Week in a variety of ways, including through National Science Week Grants supported by this item. The Australian Government has allocated $2 million over 4 years ($500,000 each year) from 2016-17 to 2019-20 to National Science Week Grants. National Science Week Grants provide funding to meritorious and high profile science engagement projects across all states and territories, and support projects that stimulate and leverage further contributions to science by organisations across Australia.
>
> Given its truly national focus on advancing the Australian community's engagement and participation in science, technology, engineering and mathematics (STEM) across all state and territory jurisdictions, it is considered that National Science Week is a nationally significant activity which could only be carried out for the benefit of Australia by the Commonwealth.
>
> National Science Week Grants also support projects with a particular focus on engaging Indigenous Australians. In 2016, this included support for the Indigenous Science Experience Family Science Fund Day, which celebrated Indigenous and Western science and Indigenous youth and elder achievements, and demonstrated the value of traditional and customary Indigenous knowledge in science and technology and the relevance of science to our daily lives.
>
> The National Science Week Grants support certain citizen science projects. Citizen science involves amateur or non-professional scientists collecting or analysing data, and formulating research questions and design, usually working with a professional scientist. Funding of $85,000 per year is allocated to support a national online citizen science project as part of National Science Week. Funding is provided for citizen science projects that are designed to collect and disseminate science data (for example in relation to bird and mammal populations).
>
> Citizen science also has a focus on the use of the internet as a means of engaging and communicating with Australians about science projects.

In 2016, funding under this initiative supported the Wildlife Spotter citizen science project, which involved the establishment of an online web portal available to all sectors of the Australian community. Individuals across Australia were encouraged to register online to classify images of wildlife taken by movement-triggered cameras set up by scientists. The project resulted in over 2.8 million images being processed, with more than 3.4 million animals identified, all using the internet.

National Science Week Grants projects (including relevant citizen science projects) may span a vast range of scientific subject matters. These include, amongst other things, projects related to documenting and recording data from astronomy projects.

National Science Week Grants projects can also include a variety of activities which give effect to Australia's obligations under international agreements which are noted in item 159. The international agreements discussed below are relevant.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to enjoy the benefits of scientific progress and its applications, and for government parties to take steps necessary for the conservation, development and diffusion of science and culture.

Articles 7, 12 and 13 of the Convention on Biological Diversity obliges parties to conduct activities which are directed to promoting the community's understanding of the importance of biodiversity, measures that can be undertaken to conserve biodiversity, and projects directed at contributing to the identification, conservation or sustainable use of biodiversity.

Articles 4 and 6 of the United Nations Framework Convention on Climate Change requires parties to undertake activities directed at improving knowledge and understanding of climate change and its effects.

Article 4 of the Ramsar convention requires parties to conduct activities directed towards improving knowledge of wetlands and their flora and fauna.

Articles 5, 17 and 19 of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, obliges parties to conduct activities which contribute to an increased knowledge of the processes leading to desertification and drought, investigating ways of mitigating the effects of drought, and sustainable use and management of the natural resources of affected areas.

New item 159 is also drafted with reference to funding in relation to places, persons, matters or things external to Australia. Citizen science projects (including nationally significant citizen science projects supported through National Science Week) may include activities outside Australia,

for example activities directed at water quality, plants or animals seaward of the low water mark.

Strategic science communication activities

Beyond National Science Week Grants, the strategic science communication activities under this item include three further elements:

1. Science tourism capacity building;

2. Decision-maker engagement; and

3. Equity of access.

1. Science tourism capacity building

The primary purpose of this element is to develop and implement a national framework for science tourism that helps to build Australia's profile as a science and innovation nation. Funding of $49,500 (incl. GST) has been provided to the Canberra Innovation Network, based in the ACT, to develop this national framework. Once the national framework is complete, roundtables will be hosted in the ACT and Northern Territory to discuss local implementation in other states and territories. A pilot may also be undertaken in the ACT to demonstrate implementation strategies to other states and territories.

Funding under this element will have a strong focus on the use of the internet and development of online resources. The science tourism roundtables mentioned above will be streamed online to enable individuals and organisations in other locations to participate via the internet. Funding may also be provided to support the development of web-based applications and other downloadable resources to enable local state and territory tourism experiences to be made available from other parts of Australia, or otherwise enhanced, via the internet. A further key aim of the science tourism activities is to facilitate international and inter-jurisdictional tourism.

Funding under this element can also give effect to Australia's obligations under international agreements that are noted in item 159. For example, Article 6(2) ofICESCR relates to supporting technical and vocational guidance and training programmes, policies and techniques to support full and productive employment. By way of further example, Articles 1 and 2 of the International Labour Organization's Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources also requires parties to adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training.

Funding under this initiative may also be provided to the states or territories to support specific science tourism activities and to support the implementation of the abovementioned national science tourism framework.

2. Decision-maker Engagement

This element aims to increase the interaction between Australia's scientists and leading decision makers, for the purpose of improving dialogue in relation to science and innovation in public policy and evidence-based decision making.

Funding under this element has been provided to Science Technology Australia to undertake events wholly in the ACT which will bring together scientists and decision makers like Parliamentarians. Funding may also be provided to the states or territories to support other activities related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

3. Equity of Access

The Equity of Access element comprises three separate funding components. The first supports the Questacon Transport Assistance Programme (QT AP). This programme subsidises the costs associated with transportation to and from Questacon from within the ACT for socially disadvantaged groups including migrants, refugees, people with a disability and people in aged care.

The second component of the Equity of Access programme provides support for the development of a low vision project, also to be undertaken wholly at Questacon in the Australian Capital Territory. Questacon is currently working with the Royal Blind Society to develop a community engagement project to open Questacon exhibitions in the ACT to the low vision community.

The final component of the Equity of Access programme provides funding for a travelling outreach programme focusing on STEM, namely the Shell Questacon Science Circus.

Questacon provides funding to the Australian National University to deliver pop-up interactive exhibits and learning experiences for children in preschools, primary schools, and secondary schools in remote and regional communities across Australia. It delivers teacher professional development workshops to support students' STEM outcomes. It also aims to benefit children by contributing to their development, as well as assisting school teachers or parents (or a child's legal guardian) to undertake activities in the classroom or at home to improve a child's understanding of science.

Funding is also provided to support the Shell Questacon Science Circus to conduct visits to remote Indigenous communities.

The Shell Questacon Science Circus is a national STEM outreach equity programme designed to ensure that Australians who would probably not otherwise be able to visit Questacon- the National Science and Technology Centre - can still access some of the benefits of this national institution.

> Delivering STEM education across all states and territories, it is considered an activity best performed by the Commonwealth of Australia.
>
> Funding under the Equity of Access element can give effect to Australia's obligations under international agreements that are noted in item 159. For example, the funding can give effect to Australia's obligations under Article 29 of the Convention on the Rights of the Child, which requires parties to conduct activities directed to the development of children, particularly educational activities.
>
> This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

The Minister for Finance further advised:

> Further to Minister Hunt's response [attached], I am also advised that the development of the initiative for the National Science Week and strategic science communication activities and the drafting of item 159 in the Industry Regulation were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the accompanying explanatory statement for this Regulation, the objective of the item references a number of heads of legislative power, namely:
>
> • the trade and commerce power;
> • the communications power;
> • the astronomical and meteorological observations power;
> • the statistics power;
> • the power to make special laws for people of any race;
> • the external affairs power;
> • the power to make grants to the States;
> • the Territories power; and
> • the Commonwealth executive power and the express incidental power.

Committee's first response

The committee thanks the minister for his response.

The committee's request for advice in relation to this regulation arose from concerns about the relevance and operation of each of the constitutional heads of power relied on to support the 'National Science Week and strategic science and communication activities' initiative.

With reference to this request, the committee notes that the minister's response usefully includes detailed information about the different elements of the initiative. To assist with the scrutiny process the committee's preference is that such details about new programs be contained in the ES to a regulation.

While the above information assists the committee to undertake its general scrutiny of the regulation, the response does not provide a clear and explicit statement of how each listed constitutional head of power supports the 'National Science Week

and strategic science and communication activities' initiative. In this respect, the committee reiterates its preference that an ES to a regulation that adds items to Part 4 of Schedule 1AB of the FFSP Regulations include a clear and explicit statement of the relevance and operation of each of the constitutional heads of power relied on to support the program.

The committee also notes the minister's advice that '[t]his answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.'

The committee takes this opportunity to note that any claims to withhold information from Senate committees require the minister to 'state recognised public interest grounds for any claim to withhold the information' that can be considered by the committee and the Senate.[15]

With respect to claims that legal professional privilege provides grounds for a refusal to provide information in a parliamentary forum, *Odgers' Australian Senate Practice* states:

> It has never been accepted in the Senate, nor in any comparable representative assembly, that legal professional privilege provides grounds for refusal of information in a parliamentary forum.
>
> …the mere fact that information is legal advice to the government does not establish a basis for this ground. It must be established that there is some particular harm to be apprehended by the disclosure of the information, such as prejudice to pending legal proceedings or to the Commonwealth's position in those proceedings. If the advice in question belongs to some other party, possible harm to that party in pending proceedings must be established, and in any event the approval of the party concerned for the disclosure of the advice may be sought. The Senate has rejected government claims that there is a long-standing practice of not disclosing privileged legal advice to conserve the Commonwealth's legal and constitutional interest.[16]

The committee gave a protective notice of motion to disallow this regulation on 21 November 2016. This motion to disallow must be resolved or withdrawn within 15 sitting days after it was given, otherwise the regulation will be deemed to be disallowed. Noting the information provided by the minister to date, the committee has resolved, on this occasion, to withdraw the protective notice of motion.

However, in light of the committee's concerns regarding the absence of a clear and explicit statement of the relevance and operation of each constitutional head of power relied on to support the 'National Science Week and strategic science

15 *Odgers' Australian Senate Practice*, 14th Edition (2016), p. 653.

16 *Odgers' Australian Senate Practice*, 14th Edition (2016), pp 668-669.

communication activities', the committee requests the further advice of the minister in relation to the above.

Minister's second response

The Minister for Finance, on behalf of the Minister for Industry, Innovation and Science, advised:

> **National Science Week**
>
> Commonwealth executive power and the express incidental power
>
> Section 61 of the Constitution, together with section 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.
>
> National Science Week is Australia's preeminent national celebration of science, seeking to provide high profile science engagement across the nation, in which the whole of the Australian community can participate. It aims to reach as many Australians as possible with a positive message about the impact science has on our lives, the Australian economy, our nation's society, and the rest of the world. It is also an important opportunity for the Australian science community to celebrate and showcase science to the Australian public and the rest of the world.
>
> The Australian Government provides National Science Week Grants to meritorious and high profile science engagement projects across all states and territories, and supports projects that stimulate and leverage further contributions to science by organisations across Australia.
>
> Given its truly national focus on advancing the Australian community's engagement and participation in science, technology, engineering and mathematics (STEM) across all state and territory jurisdictions, it is considered that National Science Week is a nationally significant activity.
>
> Power to make special laws for people of any race
>
> The races power supports laws with respect to Indigenous Australians. National Science Week Grants support projects with a particular focus on engaging Indigenous Australians. For example, in 2016, this included support for the Indigenous Science Experience Family Science Fund Day, which celebrated Indigenous and Western science and Indigenous youth and elder achievements, and demonstrated the value of traditional and customary Indigenous knowledge in science and technology and the relevance of science to our daily lives.
>
> Statistics power
>
> Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.
>
> The National Science Week Grants support citizen science projects involving amateur or non-professional scientists collecting or analysing data, and formulating research questions and design, usually working with

a professional scientist. Funding of $85,000 per year in addition to the competitive grant round is allocated to support a national citizen science project as part of National Science Week and a national website that collects data. Funding is provided for citizen science projects that are designed to collect, analyse and disseminate science data (for example in relation to bird and mammal populations).

Communications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Citizen science has a focus on the use of the internet as a means of engaging and communicating with Australians about science projects. For example, in 2016, funding under this initiative supported the Wildlife Spotter citizen science project, which involved the establishment of an online web portal available to all sectors of the Australian community. Individuals across Australia were encouraged to register online to classify images of wildlife taken by movement-triggered cameras set up by scientists.

The project resulted in over 2.8 million images being processed, with more than 3.4 million animals identified, all using the internet.

Astronomical and meteorological observations power

Section 51(vii) of the Constitution permits the Commonwealth Parliament to make laws with respect to 'astronomical and meteorological observations'. National Science Week Grants projects (including relevant citizen science projects) may span scientific subject matters that include projects related to documenting and recording data from astronomy projects.

External affairs power

The external affairs power supports legislation implementing treaties to which Australia is a party. Under the National Science Week initiative, National Science Week Grants may be provided to support projects that include activities which give effect to Australia's obligations under international treaties. This includes activities contemplated by the following treaties.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to enjoy the benefits of scientific progress and its applications, and for government parties to take steps necessary for the conservation, development and diffusion of science and culture.

Articles 7, 12 and 13 of the Convention on Biological Diversity obliges parties to conduct activities which are directed to promoting the community's understanding of the importance of biodiversity, measures that can be undertaken to conserve biodiversity, and projects directed at

contributing to the identification, conservation or sustainable use of biodiversity.

Articles 4 and 6 of the United Nations Framework Convention on Climate Change require parties to undertake activities directed at improving knowledge and understanding of climate change and its effects.

Article 4 of the Ramsar Convention requires parties to conduct activities directed towards improving knowledge of wetlands and their flora and fauna.

Articles 5, 17 and 19 of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, obliges parties to conduct activities which contribute to an increased knowledge of the processes leading to desertification and drought, investigating ways of mitigating the effects of drought, and sustainable use and management of the natural resources of affected areas.

The external affairs power also supports legislation with respect to places, persons, matters or things outside the geographical limits of Australia. Citizen science projects (including nationally significant citizen science projects supported through National Science Week) may include activities outside Australia, for example activities directed at water quality, plants or animals seaward of the low water mark.

Strategic Science Communication Activities

1. Science tourism capacity building

Territories power

The provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

Funding of $49,500 (incl. GST) has been provided to the Canberra Innovation Network, based in the ACT, to develop a national framework for science tourism that helps to build Australia's profile as a science and innovation nation. Once the framework is complete, roundtables will be hosted in the ACT and Northern Territory to discuss local implementation in other states and territories. A pilot may also be undertaken in the ACT to demonstrate implementation strategies to other states and territories.

Funding may also be provided to the ACT government or the Northern Territory government to support specific science tourism activities and to support the implementation of the national science tourism framework.

Power to make grants to the states

Section 96 of the Constitution enables the Parliament to grant financial assistance to States. Funding under this element may be provided to the states to support specific science tourism activities and to support the implementation of the national science tourism framework.

Communications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Funding under this element will have a strong focus on the use of the internet and development of online resources. The science tourism roundtables mentioned above may be streamed online to enable individuals and organisations in other locations to participate via the internet. Funding may also be provided to support the development of web-based applications and other downloadable resources to enable local state and territory tourism experiences to be made available from other parts of Australia, or otherwise enhanced, via the internet.

Trade and commerce power

Section 51(i) of the Constitution supports legislation with respect to 'trade and commerce with other countries, and among the States'.

A key aim of the science tourism activities, particularly through the development of a national science tourism framework, is to facilitate overseas and interstate trade and commerce by facilitating international and inter-jurisdictional tourism.

External affairs power

Funding under this element may be used to support the development of vocational guidance and training programmes related to science tourism.

The external affairs power supports legislation implementing treaties to which Australia is a party.

Article 6(2) of ICESCR relates to supporting technical and vocational guidance and training programmes, policies and techniques to support full and productive employment.

Articles 1 and 2 of the International Labour Organization's Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources also requires parties to adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training.

2. Decision-maker engagement

Territories power

The provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

Funding under this element has been provided to Science Technology Australia to undertake events wholly in the ACT which will bring together scientists and decision-makers like Parliamentarians. Funding may also be provided to the ACT or Northern Territory to support other activities

related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

Power to make grants to the states

Section 96 of the Constitution enables the Parliament to grant financial assistance to States. Funding under this element may be provided to the states to support activities related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

3. Equity of Access

The Equity of Access element comprises three separate funding components. The first supports the Questacon Transport Assistance Programme (QTAP). The second component of the Equity of Access programme provides support for the development of a low vision project. The final component of the Equity of Access programme provides funding for a travelling outreach programme focusing on STEM, namely the Shell Questacon Science Circus.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

The QTAP programme subsidises the costs associated with transportation to and from Questacon from within the ACT for socially disadvantaged groups including migrants, refugees, people with a disability and people in aged care.

The support for the development of a low vision project is also to be undertaken wholly at Questacon in the ACT. Questacon is currently working with the Royal Blind Society to develop a community engagement project to open Questacon exhibitions in the ACT to the low vision community.

Funding for the Shell Questacon Science Circus is provided to the Australian National University, based in the ACT, to deliver pop-up interactive exhibits and learning experiences for children in preschools, primary schools, and secondary schools in remote and regional communities across Australia.

Commonwealth executive power and the express incidental power

Section 61 of the Constitution, together with section 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Shell Questacon Science Circus is a national STEM outreach equity programme designed to ensure that Australians who would probably not otherwise be able to visit Questacon – the National Science and Technology Centre – can still access some of the benefits of this national institution. Delivering STEM education across all states and territories,

it is considered an activity best performed by the Commonwealth of Australia.

Power to make special laws for people of any race

The races power supports laws with respect to Indigenous Australians. Funding under the Equity of Access programme is provided to support the Shell Questacon Science Circus to conduct visits to remote Indigenous communities.

External affairs power

The external affairs power supports legislation implementing treaties to which Australia is a party.

Article 29 of the Convention on the Rights of the Child requires parties to conduct activities directed to the development of children, particularly educational activities.

The Shell Questacon Science Circus delivers teacher professional development workshops to support students' STEM outcomes. It also benefits children by contributing to their development, as well as assisting school teachers or parents (or a child's legal guardian) to undertake activities in the classroom or at home to improve a child's understanding of science.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

Committee's second response

The committee thanks the minister for his detailed response and has concluded its examination of the instrument.

In concluding, the committee notes that the minister has provided a clear and explicit statement of the relevance and operation of each constitutional head of power that the regulation seeks to rely on to support Commonwealth funding for the 'National Science Week and strategic science communication activities'.

The committee notes that this information would have been useful in the ES.

Instrument	**Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2017 - Reporting Standard SRS 534.0 Derivative Financial Instruments [F2017L00046]**
Purpose	Determines Reporting Standard SRS 534.0 Derivative Financial Instruments to clarify reporting regarding directly held over the counter derivatives
Last day to disallow	9 May 2017
Authorising legislation	*Financial Sector (Collection of Data) Act 2001*
Department	Treasury
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 2 of 2017

Retrospective commencement

The committee commented as follows:

Subsection 12(2) of the *Legislation Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the determination commenced retrospectively on 1 July 2016. However, the ES to the determination provides no information about the effect of the retrospective commencement on individuals.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Treasurer advised:

> APRA [Australian Prudential Regulation Authority] has undertaken to revise the ES to make clear that the Instrument's retrospective application did not disadvantage the rights of, or impose a liability on, any person for an act or omission that took place before the date of registration.
>
> The Instrument was made on 5 January 2017, with a commencement date of 1 July 2016. It revoked a pre-existing Instrument (Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2015 -

Reporting Standard SRS 534.0 Derivative Financial Instruments) which was made on 10 December 2015, and commenced 1 July 2016; and re-made it with one change: the inclusion of an additional option of 'not applicable' at item 3 of Form SRF 534.0. Both versions of the Instrument required registrable superannuation entities (RSEs) to report in relation to any derivative financial instruments held.

The use of the 1 July 2016 commencement date for the re-made Instrument was intended to reduce confusion about which reporting periods it covered.

Form SRF 534.0 is an annual form and must be submitted to APRA within 3 months of the end of the RSE's year of income. The vast majority of RSEs have a year of income which ends on 30 June. For these RSEs, the obligation to report under the re-made Instrument has not yet commenced in practical terms, i.e. these RSE licensees will be required to submit the form by 30 September 2017, for the year ending 30 June 2017.

While there are two RSEs with non-30 June balance dates and for whom the obligation to report occurred prior to the registration of the latest version of the Instrument, APRA has established that neither of these RSEs were affected by the change, as neither held derivative financial instruments and they both provided 'nil' returns. APRA is therefore satisfied that no person's rights were adversely affected by the 1 July 2016 commencement date.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes the minister's undertaking that APRA will revise the ES to include information about the retrospective commencement of the determination.

Instrument	**Indigenous Student Assistance Grants Guidelines 2017 [F2017L00036]**
Purpose	Makes the Indigenous Students Assistance Grants Guidelines 2017, which provide a framework to deal with grants under Part 2-2A of the *Higher Education Support Act 2003*
Last day to disallow	9 May 2017
Authorising legislation	*Higher Education Support Act 2003*
Department	Prime Minister and Cabinet
Scrutiny principle	Standing Order 23(3)(c)
Previously reported in	*Delegated legislation monitor* 2 of 2017

Merits review

The committee commented as follows:

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal.

Section 26 of the guidelines provides that a higher education provider must terminate an Indigenous Commonwealth Scholarship if the scholarship recipient ceases to be 'enrolled in a course of study' with the provider; and may terminate a scholarship if the recipient fails to comply with a condition of the scholarship.

However, neither the instrument nor the ES provides any information as to whether the decision to terminate a scholarship under section 26 of the guidelines will be subject to merits review, or whether it is appropriate for such decisions to be excluded from merits review.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Indigenous Affairs advised:

> Providers are subject to the Higher Education Standards Framework (Threshold Standards) 2015 in making a decision to terminate an Indigenous Commonwealth Scholarship. Relevantly, the Threshold Standards establish the minimum acceptable requirement for student grievances and complaints in relation to the provision of higher education.

The Threshold Standards require providers to maintain a review process and to engage a third party if the internal review process is unsuccessful.

Decisions about scholarships issued under other parts of the Act are also subject to the Threshold Standards.

Further information on these requirements are set out in Attachment A.

Relevant excerpt from Attachment A

Section 26 of the Guidelines provides for the following two decisions to be made in relation to termination of an Indigenous Commonwealth Scholarship.

- Subsection 26(1) of the Guidelines provides that a higher education provider must terminate an Indigenous Commonwealth Scholarship if the scholarship recipient ceases to be 'enrolled in a course of study with the provider';
- Subsection 26(2) of the Guidelines provides that a higher education provider may terminate an Indigenous Commonwealth Scholarship if the scholarship recipient fails to comply with a condition of the scholarship.

An Indigenous Commonwealth Scholarship is a scholarship of a type described in section 20 of the Guidelines, and is awarded by a higher education provider to an Indigenous student using an ISSP grant, and on the terms and conditions determined by the provider.

Section 36 of the Guidelines requires a higher education provider that receives a grant under the Guidelines to make information publicly available that advises, relevantly, Indigenous students of the procedures for dealing with grievances and making complaints about the use of a grant by the provider. This is broad enough to cover decisions relating to scholarships, including termination. A note to section 36 of the Guidelines references paragraph 2.4 of the Threshold Standards.

A decision of a higher education provider to terminate an Indigenous Commonwealth Scholarship under either subsection 26(1) or subsection 26(2) of the Guidelines is a decision to which paragraph 2.4 of the Higher Education Standards Framework (the Framework) would apply in the case of an aggrieved student. Paragraph 2.4 of the Framework establishes the minimum acceptable requirement for student grievances and complaints in relation to the provision of higher education by a higher education provider. Of particular relevance to the Committee's inquiry:

- Subparagraph 2.4(1) of the Framework requires a higher education provider to have mechanisms for students to resolve grievances about any aspect of their experience with the provider, its agents or related parties; and
- Subparagraph 2.4(3) of the Framework provides that institutional complaints-handling and appeals processes for formal complaints

must include provision for review by an appropriate independent third party if internal processes fail to resolve a grievance.

Paragraph 2.4 of the Framework applies to a decision under subsection 26(1) of the Guidelines even though the decision flows automatically from the cessation of the scholarship recipient's enrolment…

The arrangements provided for in the Framework for dealing with complaints or grievances relating to the Indigenous Commonwealth Scholarships provided for in the Guidelines are consistent with arrangements for Commonwealth Scholarships provided for in the Commonwealth Scholarships Guidelines (Education) 2010 made for Part 2-4 of the Act. The Framework ensures that there is an appropriate mechanism in place for review of decisions of higher education providers to terminate Commonwealth Scholarships, including the Indigenous Commonwealth Scholarships provided for in the Guidelines.

Committee's response

The committee thanks the minister for his response and has concluded its examination of this instrument.

In concluding, the committee notes the minister's advice that:

- higher education providers are subject to the Higher Education Standards Framework (Threshold Standards) 2015 [F2015L01639] (the Threshold Standards) which require providers to maintain a review process and to engage a third party if the internal review process is unsuccessful; and
- decisions to terminate a scholarship under section 26 of the guidelines are subject to the Threshold Standards.

The committee also notes the minister's advice that the arrangements for dealing with complaints or grievances relating to the Indigenous Commonwealth Scholarships provided for in the guidelines are consistent with the arrangements for Commonwealth Scholarships provided for in the Commonwealth Scholarships Guidelines (Education) 2010.

The committee notes that this information would have been useful in the ES.

Instrument	**Insolvency Practice Rules (Bankruptcy) 2016 [F2016L02004]**
Purpose	Creates rules for the registration, discipline, and remuneration of personal insolvency practitioners
Last day to disallow	9 May 2017
Authorising legislation	*Bankruptcy Act 1966*
Department	Attorney-General
Scrutiny principle	Standing Order 23(3)(a), (c) and (d)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Sub-delegation

The committee commented as follows:

Section 50-20 of the Insolvency Practice Rules (Bankruptcy) 2016 [F2016L02004] (the bankruptcy rules) provides that the chair of a Part 2 committee must be the Inspector-General in Bankruptcy or the Inspector-General's delegate.[17] Under subection 11(4) of the *Bankruptcy Act 1966* (Bankruptcy Act), the Inspector-General may, by signed instrument, delegate to an authorised employee all or any of the powers and functions of the Inspector-General under that Act. Section 5 of the Bankruptcy Act defines 'authorised employee' as an APS employee whose duties include supporting the Inspector-General in the performance of his or her functions, or in the exercise of his or her powers, under that Act.

However, the committee notes that neither the instrument nor the ES provides information about whether a delegate who acts as the chair of a Part 2 committee is required to be at a certain APS level, such as a member of the senior executive service.

In addition, the committee is concerned that section 50-20 contains no requirement that the Inspector-General be satisfied that a delegate acting as Chair of a Part 2 committee is appropriately trained or qualified for the role.

17 A Part 2 committee consists of three persons who make decisions as to whether a person will be registered as a practitioner, or have their registration taken away. A Part 2 committee will be formed at the point at which a matter is referred by the Inspector-General. The committee must consist of an industry representative, a representative of the regulator and an appointee of the Minister.

The committee's expectations in relation to sub-delegation accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that allows delegations to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, a limit should be set on either the sorts of powers that might be delegated or on the categories of people to whom powers might be delegated; and delegates should be confined to the holders of nominated offices or to members of the senior executive service.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Attorney-General advised:

> I note that the instrument does not alter the Inspector-General in Bankruptcy's current power to appoint a delegate to chair a committee under regulation 8.05A of the Bankruptcy Regulations 1996. Furthermore, this delegation is consistent with the Inspector-General power to, by signed instrument, delegate all or any powers and functions under the *Bankruptcy Act 1966* (see section 11 of this Act).
>
> Part 2 committees would deal with a range of matters, from ordinary trustee registration decisions to more complicated disciplinary matters. I can advise that the Inspector-General's delegate would be an executive-level officer selected on the basis of that they have the appropriate experience and qualifications to chair the committee, in accordance with the Australian Financial Security Authority's internal guidance material. Further guidance around the impartiality of delegates is contained in Inspector-General Practice Statement 8, which is publically available on the Australian Financial Security Authority's website.

Committee's response

The committee thanks the Attorney-General for his response.

The committee notes the Attorney-General's advice that the Inspector-General's delegate would be an executive-level officer with appropriate experience and qualifications to chair the committee.

The committee also notes the Attorney-General's advice that the Australian Financial Security Authority (AFSA) has issued guidance material around the impartiality of delegates which is publically available on their website.[18]

The committee notes that this information would have been useful in the ES.

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18 See Australian Government, Australian Financial Security Authority, Inspector-General Practice Statement 8, https://www.afsa.gov.au/about-us/practices/inspector-general-practice-statements/inspector-general-practice-statement-8 (accessed 2 March 2017).

However, while this guidance material forms part of the AFSA's administrative framework, the committee remains concerned that there is currently no legislative provision that specifies what qualifications or attributes a delegate who acts as the chair of a Part 2 committee is required to have, other than that the delegate is an APS employee.

The committee has concluded its examination of this matter. However, in light of the committee's concerns regarding the absence of a legislative provision that specifies what qualifications or attributes a delegate who acts as the chair of a Part 2 committee is required to have, other than that the delegate is an APS employee, the committee draws this matter to the attention of senators.

Time limit to have administrative decision reviewed

The committee commented as follows:

Scrutiny principle 23(3)(c) of the committee's terms of reference requires the committee to ensure that instruments do not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal. This scrutiny principle is relevant to the committee's consideration of legislation which sets time limits for applications to have administrative decisions reviewed.

Section 90-80 of the bankruptcy rules sets a 60-day time limit for making applications to the court in relation to an act, omission or decision of a trustee of a regulated debtor's estate. The committee notes that this 60-day time limit does not appear to be envisaged in the enabling legislation and the ES does not provide information as to why the 60-day limit is necessary and appropriate. Further, the ES does not provide information as to whether persons who may be affected by this provision will be provided with information that clearly specifies the consequences of failure to make an application within the specified time limit.

Section 90-80 also exempts applications to the court in relation to an act, omission or decision of a trustee of a regulated debtor's estate which are made by the Inspector-General. The ES states that this exemption from the time limit is required 'as the Inspector-General requires further flexibility in the enforcement and regulation of trustees'. The ES does not provide any further information as to why it is necessary and appropriate to exempt the Inspector-General from the 60-day time limit to make such an application.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Attorney-General advised:

> I note that the instrument preserves the existing 60-day time limit for making applications to the court under section 178 of the Bankruptcy Act. This section has been repealed and replaced by section 90-20 of Schedule 2 to the Bankruptcy Act, as amendments were made to group review rights within one division of that Schedule.
>
> The right to review is crucial to ensure individuals affected by trustee decisions have recourse to seek a remedy. However, this right should not be left open-ended. The right to review must be balanced against certainty of decision-making; including a time-limit provides a necessary and appropriate mechanism to balance these competing rights. Specifically, this time limit ensures the outcomes in the administration of bankruptcy have finality for practitioners, debtors and creditors after the expiration of that period. Affected individuals would be made aware of their review rights, and the 60-day time limit, through publically available information on the Australian Financial Security Authority's website.
>
> The role of the Inspector-General should be distinguished from that of the practitioners, debtors and creditors. The Inspector-General has a statutory role in the regulation and enforcement of statutory requirements under the Bankruptcy Act. As part of this role, the Inspector-General may scrutinise the conduct of a registered trustee more broadly, including conduct that may have occurred well before the 60-day timeframe. The relevant court will be able to take into consideration any procedural fairness issues that may arise where the conduct in question occurred well before an application to the court under section 90-20 of Schedule 2 to the Bankruptcy Act.

Committee's response

The committee thanks the Attorney-General for his response and has concluded its examination of this matter.

The committee notes that this information would have been useful in the ES**.**

Part 2 committee proceedings not bound by rules of evidence

The committee commented as follows:

The bankruptcy rules provide at section 50-55 that a Part 2 committee must observe natural justice and is not bound by any rules of evidence but may inform itself on any matter it sees fit.

The ES to the bankruptcy rules states:

> The requirement to observe natural justice brings with it an obligation for the committee to provide a practitioner with procedural fairness and that the decision must be made free from actual or apprehended bias. While it is not possible, or desirable, to provide an exhaustive list of how a committee will satisfy the need to afford natural justice, there are a range

> of procedural factors which it is expected that a committee will ensure are present in considering a matter, such as:
>
> - adequate disclosure to the practitioner so effective representations may be made
> - reasonable opportunity (or real chance) to present the person's case to the decision-maker, and the requirement to consider the case or the representations, and
> - opportunity for a hearing where the practitioner can be legally represented, if they so wish.
>
> While not exhaustive of all circumstances which would represent a breach of natural justice, it will not be acceptable for a member of the committee to play multiple roles of accuser, witness or prosecutor and decision-maker. For that reason the delegate of the regulator would be expected to not have played a role in the investigation of the practitioner or the preparation of the case being considered.

The ES further provides:

> …committee proceedings will be inquisitorial proceedings where members are not restrained by judicial rules of evidence. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not.

The committee acknowledges that some Part 2 committee decisions are reviewable by the Administrative Appeals Tribunal,[19] which also is not bound by the rules of evidence.[20] However, the committee is interested in exploring why it is appropriate for Part 2 committee proceedings not to be bound by the rules of evidence; why the duty for Part 2 committees to afford procedural fairness (as opposed to natural justice) is not specified in the legislative instrument; and whether consideration has been given to the development of practice directions or guidelines to provide more detail in relation to how Part 2 committee proceedings will be conducted.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Attorney-General advised:

> It is appropriate for Part 2 committees not to be bound by the rules of evidence as these committees do not operate with the level of formality of other judicial or quasi-judicial bodies. An inquisitorial process is appropriate as committee proceedings do not operate with two or more parties arguing opposing positions but rather a committee considering

19 See, for example, new section 96-1 of the Insolvency Practice Schedule (Bankruptcy) which was inserted into the *Bankruptcy Act 1966* by the *Insolvency Law Reform Act 2016*.

20 *Administrative Appeals Tribunal Act 1975,* subsection 33(1).

the position of an individual practitioner, whether for a disciplinary process or for an application to be registered as a practitioner. Further, as the committee acknowledged in its report, Part 2 committee decisions are reviewable by the Administrative Appeals Tribunal.

The issue of procedural fairness was discussed with stakeholders during the consultation process. The issue was closely considered by my departmental officers during the drafting process. In consultation with parliamentary drafters, it was determined that the term 'natural justice' would adequately encompass the principles of procedural fairness and that a reference to both within the instrument may cause confusion. The explanatory statement specifically refers to procedural fairness to clarify this point.

Guidance around the committee process is currently contained in Inspector-General Practice Statements 8 and 13, which are publically available on the Australian Financial Security Authority's website. These practice statements provide more detail on the committee process, including information on conduct of interviews and practitioner's rights to natural justice.

These practice statements will be updated to refer to relevant provisions under the instrument and Schedule 2 of the Bankruptcy Act.

Committee's response

The committee thanks the Attorney-General for his response and has concluded its examination of the instrument.

The committee notes that this information would have been useful in the ES.

Instrument	**Insolvency Practice Rules (Corporations) 2016 [F2016L01989]**
Purpose	Creates rules for the registration, discipline and remuneration of corporate insolvency practitioners
Last day to disallow	9 May 2017
Authorising legislation	*Corporations Act 2001*
Department	Revenue and Financial Services
Scrutiny principle	Standing Order 23(3)(a) and (d)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Drafting

The committee commented as follows:

Section 75-270 of the Insolvency Practice Rules (Corporations) 2016 [F2016L01989] (the corporations rules) provides that strict compliance with the rules for convening and holding a meeting (convened by an external administrator under section 439A of the *Corporations Act 2001*) will not be required in order for such a meeting to be validly held: substantial compliance will be sufficient.

The commiteee notes that section 75-270 is identical to section 64ZF of the *Bankruptcy Act 1966*, which relates to meetings of creditors. However, the ES to the corporations rules provides no information about why this provision is necessary and appropriate with respect to meetings convened by an external administrator under section 439A of the *Corporations Act 2001*.

The committee is concerned that the inclusion of section 72-270 may indicate that the provisions for convening and holding a meeting in the corporations rules may have been drafted too broadly.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Revenue and Financial Services advised:

> I note the Committee's concerns that the requirement for substantial rather than strict compliance with the rules for convening and holding a meeting, in order for the meeting to be valid, may indicate that the relevant provisions have been drafted too broadly. This approach acknowledges that invalidating a meeting would be a severe consequence for a lack of strict compliance, and that it is undesirable to hold a substantively compliant meeting again due to the cost and inconvenience involved for creditors and other affected parties. There are, however,

> other potential consequences which may flow from an absence of strict compliance with the provisions. Disciplinary action could be pursued against the practitioner involved for a breach of their duties. Affected parties could seek other orders from the Court other than that the meeting was invalid, such as compensation orders or orders that the practitioner is not entitled to remuneration.

Committee's response

The committee thanks the minister for her response and has concluded its examination of this matter.

The committee notes that this information would have been useful in the ES.

Part 2 committee proceedings not bound by rules of evidence

The committee commented as follows:

The corporations rules provide at section 50-55 that a Part 2 committee must observe natural justice and is not bound by any rules of evidence but may inform itself on any matter it sees fit.

The ES states:

> The requirement to observe natural justice brings with it an obligation for the committee to provide a practitioner with procedural fairness and that the decision must be made free from actual or apprehended bias. While it is not possible, or desirable, to provide an exhaustive list of how a committee will satisfy the need to afford natural justice, there are a range of procedural factors which it is expected that a committee will ensure are present in considering a matter, such as:
>
> - adequate disclosure to the practitioner so effective representations may be made
> - reasonable opportunity (or real chance) to present the person's case to the decision-maker, and the requirement to consider the case or the representations, and
> - opportunity for a hearing where the practitioner can be legally represented, if they so wish.
>
> While not exhaustive of all circumstances which would represent a breach of natural justice, it will not be acceptable for a member of the committee to play multiple roles of accuser, witness or prosecutor and decision-maker. For that reason the delegate of the regulator would be expected to not have played a role in the investigation of the practitioner or the preparation of the case being considered.

The ES further provides:

> …committee proceedings will be inquisitorial proceedings where members are not restrained by judicial rules of evidence. This means that the committee will not hear submissions on whether information provided is admissible in a court of law or not.

The committee is interested in exploring why it is appropriate for Part 2 committee proceedings not to be bound by the rules of evidence; why the duty for Part 2 committees to afford procedural fairness (as opposed to natural justice) is not specified in the legislative instrument; and whether consideration has been given to the development of practice directions or guidelines to provide more detail in relation to how Part 2 committee proceedings will be conducted.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Revenue and Financial Services advised:

> Part 2 committee proceedings not bound by rules of evidence
>
> It is appropriate for Part 2 committees not to be bound by the rules of evidence as these committees do not operate with the level of formality of other judicial or quasi-judicial bodies. An inquisitorial process is appropriate as committee proceedings do not operate with two or parties arguing opposing positions but rather a committee considering the position of an individual practitioner, whether for a disciplinary process or for an application to be registered as a practitioner. Further, Part 2 committee decisions are reviewable by the Administrative Appeals Tribunal under Part 9.4A of the *Corporations Act 2001*.
>
> I note the instrument went through a rigorous targeted consultation process as well as a public consultation process. The issue of procedural fairness was discussed with stakeholders during the consultation process. The issue was closely considered by my departmental officers during the drafting process. In consultation with parliamentary drafters, it was determined that the term 'natural justice' would adequately encompass the principles of procedural fairness and that a reference to both within the instrument may cause confusion. The explanatory statement specifically refers to procedural fairness to clarify this point.
>
> I can advise that Guidance will be issued providing further detail as to committee process, akin to the Practice and Procedures Manuals currently issued for the Companies Auditors Liquidators Disciplinary Board and the practice statements issued on the process for bankruptcy committees.

Committee's response

The committee thanks the minister for her response and has concluded its examination of the instrument.

The committee notes that this information would have been useful in the ES.

Instrument	**Marine Order 32 (Cargo handling equipment) 2016 [F2016L01935]**
Purpose	Prescribes matters for machinery and equipment of a vessel that is used for loading or unloading including its inspection, testing, maintenance and operation
Last day to disallow	9 May 2017
Authorising legislation	*Navigation Act 2012*
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Drafting

The committee commented as follows:

Subsection 13(4) of Schedule 3 to the order requires that 'material, design, manufacture, marking, testing and certification of flat synthetic-webbing slings must comply with the relevant Australian Standards or Appendix E of the ILO (International Labour Organization) Code'.

However, neither the order nor the ES states which relevant Australian Standards apply in this instance.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Infrastructure and Transport advised:

> The Australian Maritime Safety Authority [AMSA] has advised that this was an oversight and that the Order will be amended as soon as possible to clearly identify the Australian Standards that are to apply. Consistent with the Committee's Guidelines on incorporation, information will be provided as to the manner of incorporation of the standards and how and where the standards may be accessed.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes the minister's undertaking that AMSA will amend the order to specify the Australian Standards that are to apply, the manner in which they are incorporated and how and where they can be accessed. In this regard, the

committee notes its expectations that incorporated documents be readily and freely available (i.e. without cost) to the public.

The committee's expectations in this regard are set out in the guideline on incorporation in Appendix 1.

Instrument	**National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2017 [F2017L00088]**
Purpose	Amends the National Disability Insurance Scheme (Becoming a Participant) Rules 2016 to align the age requirements for South Australian residents more closely with other jurisdictions
Last day to disallow	9 May 2017
Authorising legislation	*National Disability Insurance Scheme Act 2013*
Department	Social Services
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 2 of 2017

Retrospective commencement

The committee commented as follows:

Subsection 12(2) of the *Legislation Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the rules commenced retrospectively on 1 January 2017. However, the ES to the rules provides no information about the effect of the retrospective commencement on individuals.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Social Services advised:

> In response to the Committee's concerns, I can assure you that no individuals will be disadvantaged by the retrospective commencement of the instrument. Having regarded to subsection 12(2) of the *Legislation*

Act 2003, I will submit a revised Explanatory Statement, following consultation with South Australia.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes the minister's undertaking to submit a revised ES to include information about the retrospective commencement of the instrument.

Instrument	**National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2016 [F2017L00087]**
Purpose	Sets out the ways in which the requirements of the Regulations in relation to auditing knowledge and experience may be met
Last day to disallow	9 May 2017
Authorising legislation	National Greenhouse and Energy Reporting Regulations 2008
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 2 of 2017

Access to incorporated documents

The committee commented as follows:

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the instrument incorporates a number of Australian and international standards, as well as the 'International Handbook of Universities' (the handbook). While the ES is generally helpful in providing information about where documents incorporated into the instrument can

be obtained, the ES states that the Australian and international standards and the handbook are available to purchase from the relevant publishers and does not provide information as to where these documents can be accessed for free.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for the Environment and Energy advised:

> The Clean Energy Regulator has informed me that those persons who need to use… the NGER (Auditor Registration) Instrument 2016 (the 2016 Instrument) will already have access to the Australian Standards incorporated in those documents.
>
> Members of the public who wish to know how many renewable energy certificates their solar hot water systems will receive can access alternative information on the Clean Energy Regulator website that does not require access to, or an understanding of, the Determination or Standards.
>
> The Clean Energy Regulator is currently negotiating with SAI Global Pty Ltd (the distributor of the Standards on behalf of Standards Australia) to provide copies to members of the general public who are affected by, or have a genuine interest in and need to access the Standards to understand the operation of… the 2016 Instrument. The cost of provision of these copies would be met by the Clean Energy Regulator. Copies would be provided where a person has a genuine need and cannot otherwise access the Standards at no cost (for example, through libraries).
>
> A full explanation is set out in the attached response at Attachment B. The Clean Energy Regulator would be happy to draft supplementary explanatory statements to provide this additional information.
>
> Relevant excerpt from attachment B:
>
> It is industry practice that audit Standards are applied when conducting audits. Specifying that an auditor has experience and knowledge in relevant Standards, when applying for registration as a greenhouse and energy auditor, ensures that only appropriately qualified auditors can play an assurance role under the National Greenhouse and Energy Reporting scheme and the Emissions Reduction Fund scheme.
>
> At the point of registration as a greenhouse and energy auditor, auditors should already be appropriately qualified and would already have had exposure and access to relevant Standards because auditing Standards set:
>
> - the responsibilities of an auditor when engaged to undertake an audit; and
> - the form and content of the auditor's report.

An auditor can register using the following incorporated Australian Audit Standards or International Audit Standards. Australian Audit Standards are available at no cost from the Auditing and Assurance Standards Board websjte (www.auasb.gov.au). International Audit Standards are available at no cost from the International Auditing and Assurance Standards Board website (www.iaasb.org).

Standard	Title	Accessible at no cost
Standard on Assurance Engagements ASAE 3000	*Assurance Engagements Other than Audits or Reviews of Historical Financial Information*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au)
Standard on Assurance Engagements ASAE 3100	*Compliance Engagements*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au)
Standard on Assurance Engagements ASAE 3410	*Assurance Engagements on Greenhouse Gas Statements*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au)
Standard on Related Services ASRS 4400	*Agreed-Upon Procedures Engagements to Report Factual Findings*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au)
International Standard on Assurance Engagements 3000 (revised)	*Assurance Engagements Other than Audits or Reviews of Historical Financial Information*, set out in the *Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements*	Available at no cost from the International Auditing and Assurance Standards Board website (www.iaasb.org)
International Standard on Assurance Engagements 3410	*Assurance Engagements on Greenhouse Gas Statements*	Available at no cost from the International Auditing and Assurance Standards Board website (www.iaasb.org)

The following international equivalent (ISO) Standards are incorporated by reference in to the 2016 Instrument to allow for a broader field of applicants:

Item	Standard	Title	Accessible at no cost
1	AS ISO 14064.2–2006	*Greenhouse gases Part 2: Specification with guidance at the project level for quantification and reporting of greenhouse gas*	Available at no cost through National Library of Australia and interlibrary loan

		emission reductions and removal enhancements	
2	AS ISO 14064.3–2006	*Greenhouse gases Part 3: Specification with guidance at the project level for quantification and reporting of greenhouse gas reduction and removal enhancements*	Available at no cost through National Library of Australia and interlibrary loan
3	AS/NZS ISO 19011:2014	*Guidelines for auditing management systems*	Available at no cost through National Library of Australia and interlibrary loan
4	ISO 14064-2:2006	*Greenhouse gases -- Part 2: Specification with guidance at the project level for quantification and reporting of greenhouse gas emission reductions or removal enhancements*	Identical to AS ISO 14064.2–2006, which is available at no cost through National Library of Australia and interlibrary loan
5	ISO 14064-3:2006	*Greenhouse gases -- Part 3: Specification with guidance for the validation and verification of greenhouse gas assertions*	Identical to AS ISO 14064.3–2006, which is available at no cost through National Library of Australia and interlibrary loan
6	ISO 19011:2011	*Guidelines for auditing management system*	Identical to AS/NZS ISO 19011:2014, which is available at no cost through National Library of Australia and interlibrary loan
7	ISO/IEC 17024:2012	*Conformity assessment -- General requirements for bodies operating certification of persons*	Identical to AS/NZS ISO/IEC 17024:2013, which is available at no cost through National Library of Australia and interlibrary loan

The ISO Standards referenced at items 1, 2, and 3 are available at no cost from the National Library of Australia and can be viewed by interlibrary loan. The Standards specified in items 1 and 4 and 2 and 5 and 3 and 6 are identical in content. Item 7 is identical in content to AS/NZS ISO/IEC 17024:2013, which is also available at no cost from the National Library of Australia. Each of the Standards can be purchased from SAI Global for between $160 - $220.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

In concluding, the committee welcomes the minister's advice that the Clean Energy Regulator is in the process of negotiating with SAI Global to enable the Regulator to make the incorporated Standards available free of charge to members of the general public.

The committee notes the minister's advice that once the negotiation process is complete, the Clean Energy Regulator will publish details on its website explaining how to obtain copies of the various documents.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[21] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

Instrument	**National Health (Listed drugs on F1 or F2) Amendment Determination 2016 (No. 11) (PB 104 of 2016) [F2016L01833]**
Purpose	Amends the National Health (Listed drugs on F1 or F2) Determination 2010 (No. PB 93 of 2010)
Last day to disallow	30 March 2017
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Description of consultation

The committee commented as follows:

Section 17 of the *Legislation Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or,

21 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

if there has been no consultation, to explain why none was undertaken (paragraphs 15J(2)(d) and (e)).

With reference to these requirements, the committee notes that the ES for this determination states:

> The Amending Determination affects pharmaceutical companies with medicines listed on the PBS. Before drugs are listed and allocated to formularies, there are detailed consultations about the drug with the intended responsible person, and a recommendation is received from the Pharmaceutical Benefits Advisory Committee (PBAC). Any PBAC recommendation is made following receipt of submissions by affected pharmaceutical companies. Two-thirds of the PBAC membership is from the following interests or professions: consumers, health economists, practising community pharmacists, general practitioners, clinical pharmacologists and medical specialists.

While the committee does not usually interpret paragraphs 15J(2)(d) and (e) as requiring a highly detailed description of consultation undertaken, it considers that an overly bare or general description is insufficient to satisfy the requirements of the *Legislation Act 2003*. In this case, the committee considers that the ES, while providing a description of a general process or approach, does not provide an informative description of consultation that was undertaken specifically in relation to this instrument.

The committee's expectations in this regard are set out in the guideline on consultation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above; and requests that the ES be updated in accordance with the requirements of the *Legislation Act 2003*.

Minister's response

The Minister for Health advised:

> As requested in *Delegated legislation monitor* 1 of 2017, the Explanatory Statement for the Determination will be updated (as per the attached) and the Federal Register of Legislation updated. All future applicable Explanatory Statements will follow the Committee's advice. The Explanatory Statements for those Pharmaceutical Benefits instruments referenced in *Delegated legislation monitor* 2 of 2017 will also be updated.

The replacement ES states:

> The Amending Determination affects pharmaceutical companies with medicines listed on the PBS. Before drugs are listed and allocated to formularies, there are detailed consultations about the drug with the intended responsible person, and a recommendation is received from the Pharmaceutical Benefits Advisory Committee (PBAC). Any PBAC recommendation is made following receipt of submissions by affected

pharmaceutical companies. Two-thirds of the PBAC membership is from the following interests or professions: consumers, health economists, practising community pharmacists, general practitioners, clinical pharmacologists and medical specialists. Further consultation on the Amending Determination was deemed unnecessary due to the consultations with affected pharmaceutical companies on allocation of the drugs to formularies having already taken place.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes that a replacement ES to this determination has been registered on the Federal Register of Legislation.

The committee accepts that with respect to this determination consultations with affected pharmaceutical companies occurred as part of the PBAC process, and therefore no further consultation was considered necessary.

However, the committee remains concerned that the description of the PBAC process or approach does not meet the committee's expectations with respect to consultation because it describes the process generally rather than applying to the actual consultation undertaken for the specific instrument (or, where consultation was not undertaken in relation to a particular instrument, an explanation as to why no such consultation was undertaken).

The committee also thanks the minister for his advice that replacement ESs to the Pharamaceutical Benefits instruments commented on in *Delegated legislation monitor* 2 of 2017 will also be updated to address the committee's concerns regarding consultation.[22] The committee would appreciate if this update takes into account its views noted above.

22 See *Delegated legislation monitor* 2 of 2017, pp 21–22.

Instrument	**National Health (Paraplegic and Quadriplegic Program) Special Arrangement Amendment Instrument 2016 (No 3) (PB 102 of 2016) [F2016L01930]**
Purpose	Amends the National Health (Paraplegic and Quadriplegic Program) Special Arrangement 2010 (PB 118 of 2010)
Last day to disallow	9 May 2017
Authorising legislation	*National Health Act 1953*
Department	Health
Scrutiny principle	Standing Order 23(3)(b)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Retrospective commencement

The committee commented as follows:

The instrument commenced retrospectively on 1 December 2016. The ES to the instrument states that amendments made by the instrument reflect changes made to the National Health (Listing of Pharmaceutical Benefits) Instrument 2012, which commenced on the same day.

Subsection 12(2) of the *Legislation Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that ESs explicitly address the question of whether an instrument with retrospective commencement would disadvantage any person other than the Commonwealth.

With reference to these requirements, the committee notes that the ES to the instrument provides no information about the effect of the retrospective commencement on individuals.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for Health advised:

> The National Health (Paraplegic and Quadriplegic Program) Special Arrangement 2010 (PB 118 of 2010) applies to 'pharmaceutical benefits' specified in it (see s 4). The amendment made by the instrument was the removal of the listing of the Microlax brand of sorbitol with sodium citrate and sodium lauryl sulfoacetate (and the consequential removal of the

'responsible person' code for Johnson & Johnson Pacific Pty Limited) with effect from 1 December 2016. It is noted that the brand name Microlax sorbitol with sodium citrate and sodium lauryl sulfoacetate was also removed from the Pharmaceutical Benefits Schedule on 1 December 2016. Accordingly, from 1 December 2016 the Microlax brand of sorbitol with sodium citrate and sodium lauryl sulfoacetate had not been a 'pharmaceutical benefit' to which the Special Arrangement could apply. The retrospective amendment merely removed the redundant listing.

In any event, the Commonwealth is not aware of any person who was disadvantaged by the retrospective commencement of this instrument. Further, in accordance with subsection 12(2) of the *Legislation Act 2003*, to the extent that as a result of the retrospective commencement of the instrument did affect the rights of a person (other than the Commonwealth) so as to disadvantage them, or impose liabilities on them in respect of anything done before that day, it would not apply to that person.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

The committee notes that this information would have been useful in the ES.

Instrument	**Part 21 Manual of Standards Instrument 2016 [F2016L00915]**
Purpose	Prescribes standards for classes of light sport aircraft and for articles for use on civil aircraft; and requirements for special certificates of airworthiness and persons carrying out approved design activities for approved design organisations
Last day to disallow	21 November 2016
Authorising legislation	Civil Aviation Safety Regulations 1998
Department	Infrastructure and Regional Development
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Access to incorporated documents

The committee commented as follows:

The committee previously received advice from the Minister for Infrastructure and Transport that the Civil Aviation and Safety Authority expected to amend the ES to this instrument to provide a further description of incorporated documents and

indicate where they could be obtained. A replacement ES has been registered and received by the committee.

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely (i.e. without cost) available to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that section 1.10 of the instrument incorporates, as in force from time to time, various international airworthiness requirements, certification specifications and standards. However the replacement ES to the instrument states that the 'cost of obtaining a standard is a matter for the manufacturer who elects to use the standard'.

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely access its terms. The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[23] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

While the committee notes that the replacement ES has been made in response to previous concerns it raised with respect to access to incorporated documents, the committee remains concerned about this issue, as it appears that the standards can only be obtained for a fee, and the replacement ES does not provide information about whether such standards can otherwise be accessed for free by persons interested in or affected by the instrument.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

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23 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

Minister's response

The Minister for Infrastructure and Transport advised:

> CASA incorporates requirements by reference to reduce the length and complexity of instruments and where there is no value in paraphrasing or reproducing the incorporated material. Examples of documents that CASA instruments incorporate by reference include foreign or privately owned airworthiness standards, standards for non-aviation specific matters (e.g. standards for standard parts like nuts and bolts) that are administered [by] Australian Standards or other standards bodies, CASA policy documents, documents produced by manufacturers of aircraft and operational documents of particular operators. These standards are selected because they promote the safe conduct of the relevant aviation activities. Wherever possible CASA uses freely available standards.
>
> In some cases, CASA may incorporate a purchasable standard as an alternative to a freely available standard, providing choice. If CASA did not provide that choice, then the purchasable standard would not be able to be used to comply with aviation safety requirements even if a person wished to use it. This is the situation with the standards incorporated into the Part 21 Manual of Standards [F2016L00915].
>
> In other cases, particularly in relation to older aircraft no longer supported by the original manufacturer, there are only standards made available for a fee from the manufacturer…
>
> CASA recognises the importance of the principle of the free availability of legal requirements, including matters such as standards that might be incorporated into law by reference. However, CASA has a limited role in influencing either policy or the law on the issue, particularly in relation to foreign and non-aviation specific standards. For its part, however, CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard in appropriate circumstances.
>
> At the same time, CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available. To do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

In concluding, the committee notes the minister's advice that the only standards that can be used to comply with aviation safety requirements under this instrument are available at a cost; and that CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard.

The committee also notes the minister's advice that CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available; and that to do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[24] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

Instrument	**Renewable Energy (Method for Solar Water Heaters) Determination 2016 [F2017L00028]**
Purpose	Determines a new method for calculating the number of certificates that may be created for a particular model of solar water heater and revokes all previous determinations made for that purpose
Last day to disallow	9 May 2017
Authorising legislation	Renewable Energy (Electricity) Regulations 2001
Department	Environment and Energy
Scrutiny principle	Standing Order 23(3)(a)
Previously reported in	*Delegated legislation monitor* 2 of 2017

Access to incorporated documents

The committee commented as follows:

24 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

The committee's expectations where a legislative instrument incorporates a document generally accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to legislation that incorporates documents not readily and freely available (i.e. without cost) to the public. Generally, the committee will be concerned where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms.

With reference to the above, the committee notes that the determination incorporates a number of Australian Standards. While sections 5 and 7 of the determination specify the manner in which each of the standards is incorporated, with respect to accessibility, the ES states:

> Australian Standards are available for purchase from Standards Australia Limited.

The ES does not provide further information as to where the standards incorporated into the determination can be accessed for free.

The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Minister for the Environment and Energy advised:

> The Clean Energy Regulator has informed me that those persons who need to use the Renewable Energy (Method for Solar Water Heaters) Determination 2016 (the 2016 Determination)… will already have access to the Australian Standards incorporated in those documents.
>
> Members of the public who wish to know how many renewable energy certificates their solar hot water systems will receive can access alternative information on the Clean Energy Regulator website that does not require access to, or an understanding of, the Determination or Standards.
>
> The Clean Energy Regulator is currently negotiating with SAI Global Pty Ltd (the distributor of the Standards on behalf of Standards Australia) to provide copies to members of the general public who are affected by, or have a genuine interest in and need to access the Standards to understand the operation of the 2016 Determination... The cost of provision of these copies would be met by the Clean Energy Regulator. Copies would be provided where a person has a genuine need and cannot otherwise access the Standards at no cost (for example, through libraries).

A full explanation is set out in the attached response at Attachment B. The Clean Energy Regulator would be happy to draft supplementary explanatory statements to provide this additional information.

Relevant excerpt from attachment B:

It is only certain manufacturers or distributors of solar water heaters that have chosen to apply to the Clean Energy Regulator to have models of solar water heaters registered in accordance with the 2012 Determination. Given the cost of equipment and technical expertise required to manufacture or test solar water heaters, the Clean Energy Regulator expects that it will continue to be only a limited number of manufacturers or distributors of solar water heaters that will choose to apply for registration in accordance with the 2016 Determination.

Like the 2012 Determination, the 2016 Determination incorporates a number of Australian Standards that are widely used in the construction, electricity and related industries. Incorporating the Standards avoids the possibility that (should the Standards be paraphrased or not explicitly mentioned) the Determinations may be inconsistent with other Commonwealth and State/Territory laws.

The Clean Energy Regulator expects that all relevant industry participants who would use the 2016 Determination will already have access to the incorporated Standards, for the following reasons:

a. In November 2013 and February 2016 the Clean Energy Regulator consulted with the solar water heater industry on the proposed approach in the 2016 Solar Water Heater Determination. None of the received feedback raised the issue of accessibility or cost of Australian Standards;

b. The 2012 Determination incorporated the same Standards. No-one, including those who were specifically consulted or made comments in 2013 and 2016, has previously expressed any concern around accessibility or cost of the Standards.

c. A number of solar water heater industry participants are involved in the Standard setting process which entitles them to access that Standard for no cost;

d. Compliance with a number of the Standards is required for other laws, such as the National Construction Code, or to obtain incentives under the Victorian Energy Efficiency Target. The National Construction Code also references a number of these Standards in setting requirements types of water heaters that may be installed in some dwellings;

e. The majority of the users of the 2016 Determination would have used the 2012 Determination, which incorporated the same Standards.

The Clean Energy Regulator does not believe that the general public will use the 2016 Determination. The information they require (ie the number of certificates that their solar water heater system will be eligible for) is already published on the Clean Energy Regulator website.

The Solar Water Heater Determination incorporates the following Standards as a way to ensure product quality and the safety of Australian householders:

Item	Standard	Title	Accessible at no cost
1	AS 3498-2009	Authorization requirements for plumbing products – Water heaters and hot-water storage tanks	Available at no cost through National Library of Australia and interlibrary loan
2	AS 4552-2005 (as in force immediately before it was superseded)	Gas fired water heaters for hot water supply and/or central heating	Available at no cost through National Library of Australia and interlibrary loan
3	AS/NZS 2535.1:2007	Test methods for solar collectors – Part 1: Thermal performance of glazed liquid heating collectors including pressure drop	Available at no cost through National Library of Australia and interlibrary loan
4	AS/NZS 2712:2007	Solar and heat pump water heaters – design and construction	Available at no cost through National Library of Australia and interlibrary loan
5	AS/NZS 4234:2008 (as in force at the time it was made)	Heated water systems – Calculation of energy consumption	Available at no cost through National Library of Australia and interlibrary loan
6	AS/NZS 5125.1:2010 (as in force immediately before it was superseded)	Heat pump water heaters – Performance assessment – Part 1: Air source heat pump water heaters	Available at no cost through National Library of Australia and interlibrary loan
7	AS/NZS 4234:2008 Amendment 1	Amendment No. 1 to AS/NZS 4234:2008 Heated water systems—Calculation of energy consumption made in March 2011	Available at no cost through SAI Global (https://infostore.saiglobal.com/store/)
8	AS/NZS 4234:2008 Amendment 2	Amendment No. 2 to AS/NZS 4234:2008 Heated water systems—Calculation of energy consumption made in November 2011	Available at no cost through SAI Global (https://infostore.saiglobal.com/store/)

The Amendments referenced at items 7 and 8 of the above table are publically available at no cost at https://infostore.saiglobal.com/store/. The Clean Energy Regulator will also keep and make copies of these Amendments available at no cost upon request by members of the public who are affected by, or have a genuine interest in and need to access the relevant documents to understand the operation of the 2016

> Determination and who are not otherwise able to download the Amendments for themselves. (A notice to this effect will be placed on the Clean Energy Regulator's website.)
>
> The Standards referenced at items 1 – 6 are all publically available at the National Library of Australia and are available for interlibrary loan. Alternatively, they can be purchased at https://infostore.saiglobal.com/store/ for between $100 - $300. Due to copyright and licensing arrangements, the Regulator is unable to publish the Standards on its website.

Committee's response

The committee thanks the minister for his response and has concluded its examination of the instrument.

In concluding, the committee welcomes the minister's advice that the Clean Energy Regulator is in the process of negotiating with SAI Global to enable the Regulator to make the incorporated Standards available free of charge to members of the general public.

The committee notes the minister's advice that once the negotiation process is complete, the Clean Energy Regulator will publish details on its website explaining how to obtain copies of the various documents.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[25] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

The committee remains concerned about the lack of free access to material incorporated into legislation generally, and will continue to monitor this issue.

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25 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/416D0BF968BDB17048257FDB0009BEF9/$file/dg.asa.160616.rpf.084.xx.pdf (accessed 6 February 2017).

Instrument	**Student Identifiers (Exemptions) Amendment Instrument 2016 [F2016L02003]**
Purpose	Extends an exemption allowing registered training organisations to issue vocational educational and training qualifications or statements of attainment to individuals without a student identifier
Last day to disallow	9 May 2017
Authorising legislation	*Student Identifiers Act 2014*
Department	Education and Training
Scrutiny principle	Standing Order 23(3)(d)
Previously reported in	*Delegated legislation monitor* 1 of 2017

Matter more appropriate for parliamentary enactment

The committee commented as follows:

Scrutiny principle 23(3)(d) of the committee's terms of reference requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via primary rather than delegated legislation). This may include instruments which extend relief from compliance with principal legislation.

This instrument extends a current exemption for a further year to 1 January 2018 for registered training organisations who deliver vocational educational and training (VET) courses that last one day or less to issue VET qualifications, or VET statements of attainment, to individuals without a student identifier.

The ES for the instrument states:

> Subsection 53(1) of the Act [*Student Identifiers Act 2014*] specifies that a registered training organisation must not issue a VET qualification or a VET statement of attainment to an individual unless the individual has been assigned a student identifier. Subsection 53(2) of the Act specifies that subsection 53(1) does not apply to an issue specified by the Minister under subsection 53(3).
>
> Subsection 6(4) of the Principal Instrument [Student Identifiers Regulation 2014] contains an exemption to this requirement that allows registered training organisations who deliver VET courses that last one day or less, to issue a VET qualification or VET statement of attainment to individuals who are unable to obtain a student identifier before the completion of the VET course. This exemption is limited in duration and was due to expire on 1 January 2016.

> Registered training organisations caught by the exemption requested that the exemption be extended. The *Student Identifiers (Exemptions) Amendment Instrument 2015 (No. 2)* extended this exemption for a year to 1 January 2017.

Given the unchanged purpose of the exemption, it appears that the instrument may be addressing an unintended consequence of the operation of the provisions of the *Student Identifiers Act 2014* concerning the issuance of VET qualifications.

The committee generally prefers that exemptions are not used or do not continue for such time as to operate as de facto amendments to principal legislation (in this case the *Student Identifiers Act 2014*). However, no information is provided in the ES as to why the exemption has been re-made rather than seeking to amend the relevant VET qualifications provisions of the *Student Identifiers Act 2014*.

The committee requests the advice of the minister in relation to the above.

Minister's response

The Assistant Minister for Vocational Education and Skills advised:

> The purpose of the exemption for single-day courses was to recognise issues that may arise where enrolment, course delivery, assessment and issuing of qualifications all occur on the same day. This leaves limited time to resolve issues with identity verification, which is an important element in the student identifiers scheme. The exemption was initially intended to expire on 31 December 2015, but was extended for a further year after feedback from affected training providers, to give them more time to adjust their business processes to the student identifier requirements, for example by modifying their enrolment procedures to collect student identifiers in advance of the course.
>
> I and all skills ministers from states and territories agreed to the extension of the exemption for a further 12 months because the exemption is currently part of a wider review of VET data collection arrangements. The review of the National VET Provider Collection Data Requirements Policy (VDR Policy) includes all current reporting exemptions relating to the collection of VET data. Term of Reference 3 of the review relates to 'The effectiveness, suitability and impact of all current (and any proposed) exemptions for collecting and reporting Total VET Activity and Unique Student Identifier (USI) data'. This USI exemption is one of six exemptions and concessions being considered in the review.
>
> The review is being conducted by the Australian Government Department of Education and Training on behalf of all skills ministers and is expected to be considered by ministers in mid-2017. More information about the review is available at: https://submissions.education.gov.au/Forms/VETDP/pages/index

Should a decision be taken through the review to continue this exemption, appropriate steps will be taken to implement the decision in accordance with the *Student Identifiers Act 2014*.

Committee's response

The committee thanks the minister for her response and has concluded its examination of the instrument.

The committee notes the minister's advice that the exemption is currently part of a wider review of VET data collection arrangements, and that this exemption will be reconsidered as a result of the review.

The committee notes that this information would have been useful in the ES.

Senator John Williams (Chair)

Appendix 1

Guidelines

Guideline on consultation

Purpose

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the *Legislation Act 2003* (the Act)[1] regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister or instrument-maker seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister or instrument-maker seeking compliance, and ensure that an instrument is not potentially subject to disallowance.

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the instrument-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

Requirements of the *Legislation Act 2003*

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument.

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1 On 5 March 2016 the *Legislative Instruments Act 2003* became the *Legislation Act 2003* due to amendments made by the *Acts and Instruments (Framework Reform) Act 2015*.

It is important to note that section 15J of the Act requires that ESs describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

Describing the nature of consultation

To meet the requirements of section 15J of the Act, an ES must describe the nature of any consultation that has been undertaken. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

- **Method and purpose of consultation**: An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.
- **Bodies/groups/individuals consulted**: An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.
- **Issues raised in consultations and outcomes**: An ES should identify the nature of any issues raised in consultations, as well as the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

Explaining why consultation has not been undertaken

To meet the requirements of section 15J of the Act, an ES must explain why no consultation was undertaken. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

- **Absence of consultation**: Where no consultation was undertaken the Act requires an explanation for its absence. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning supporting this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.
- **Timing of consultation**: The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument, that consultation cannot generally be cited to satisfy the requirements of sections 17 and 15J of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

Guideline on incorporation

Purpose

This guideline provides information on the committee's expectations in relation to legislative instruments that incorporate, by reference, Acts, legislative instruments or other external documents, without reproducing the relevant text of the incorporated material in the instrument.

Where an instrument incorporates material by reference, the committee expects the instrument and/or its explanatory statement (ES) to:

1. specify the manner in which the Act, legislative instrument, or other document is incorporated;
2. identify the legislative authority for the manner of incorporation specified;
3. contain a description of the incorporated document; and
4. include information as to where the incorporated document can be readily and freely accessed.

These expectations reflect the fact that incorporated material becomes a part of the law.

The guideline includes brief background information, an outline of the legislative requirements and guidance about the committee's expectations in relation to ESs.

Manner of incorporation

Instruments may incorporate, by reference, Acts, legislative instruments and other documents as they exist at different times (for example, as in force from time to time, as in force at a particular date or as in force at the commencement of the instrument). However, the manner in which material is incorporated must be authorised by legislation.

Legislative framework

Section 14 of the *Legislation Act 2003* allows legislative instruments to make provision in relation to matters by incorporating Commonwealth Acts and disallowable legislative instruments, either as in force at a particular time or as in force from time to time. Authorising or other legislation may also provide that other documents can be incorporated into instruments as in force from time to time. However, in the absence of such legislation, other documents may only be incorporated as at the commencement of the legislative instrument (see subsection 14(2) of the *Legislation Act 2003*).

Committee's expectations

The committee expects instruments (and ideally their accompanying ESs) to clearly specify:

- the manner in which Acts, legislative instruments and other documents are incorporated (that is, either as in force from time to time or as in force at a particular time); and
- the legislative authority for the manner of incorporation.

This enables a person interested in or affected by an instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material.

Below are some examples of reasons provided in ESs for the incorporation of different types of documents that the committee has previously accepted:

- **Commonwealth Acts and disallowable legislative instruments**

  Section 10 of the *Acts Interpretation Act 1901* (as applied by section 13(1)(a) of the *Legislation Act 2003*) has the effect that references to Commonwealth disallowable legislative instruments can be taken to be references to versions of those instruments as in force from time to time.

- **State and Territory Acts**

  Section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to State and Territory Acts can be taken to be references to versions of those Acts as in force from time to time.

- **Other documents (for example, Commonwealth instruments that are exempt from disallowance, Australian and international Standards)**

  A section of the authorising (or other) legislation is identified that operates to allow these documents to be incorporated as in force from time to time.

Description of, and access to, incorporated documents

A fundamental principle of the rule of the law is that every person subject to the law should be able to readily and freely (i.e. without cost) access its terms. This principle is supported by provisions in the *Legislation Act 2003*.

Legislative framework

Paragraph 15J(2)(c) of the *Legislation Act 2003* requires the ES for a legislative instrument that incorporates a document to contain a description of that document and indicate how it may be obtained.

Committee's expectations

The committee expects ESs to:

- contain a description of incorporated documents; and
- include information about where incorporated documents can be readily and freely accessed (for example, at a particular website).

In this regard, the committee's expectations accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to provisions of bills that authorise material to be incorporated by reference, particularly where the material is not likely to be readily and freely available to the public.

Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[2] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

Below are some examples of explanations provided in ESs with respect to access to incorporated documents which, with the appropriate justification, the committee has previously accepted:

- copies of incorporated documents will be made available for viewing free of charge at the administering agency's state and territory offices;
- the relevant extracts from the incorporated documents are set out in full in the instrument or ES; or

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2 Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3 (accessed 10 January 2017).

- copies of incorporated documents will be made available free of charge to people affected by, or interested in, the instrument on request to the administering agency.

Appendix 2

Correspondence

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MC17-005201

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600
regords.sen@aph.gov.au

Dear Senator

I refer to your letter concerning Senate Regulations and Ordinances Committee – Exempt Native Specimens, National Greenhouse and Energy reporting, Renewable energy.

Amendment of List of Exempt Native Specimens 11/02/2017 F2017L00045

Nautilidae was listed under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) following the Conference of the Parties to the Convention, at its 17th meeting, held in Johannesburg, South Africa (24 September to 4 October 2016).

Prior to the Conference of the Parties, the Delegate of the then Minister for the Environment consulted the relevant Commonwealth, State and Territory fisheries agencies and commercial fishing industries and associations, commercial shell traders, and homewares and retail industry on the proposed listing of Nautilidae under CITES.

Specimens listed under CITES are not generally included in the List of Exempt Native Specimens (LENS), therefore the amendment of the entry to remove Nautilidae from the LENS is required as a consequence of its listing under CITES.

As the amendment to the LENS is administrative in nature and the relevant stakeholders had already been consulted about the proposed listing of Nautilidae under CITES, no additional consultation was conducted for this amendment to the LENS.

A corrected explanatory statement has now been prepared (a copy is at **Attachment A**) that accurately reflects the consultation that occurred, and will be lodged on the Federal Register of Legislation.

National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2016 F2017L00087 and Renewable Energy (Method for Solar Water Heaters) Determination 2016 F2017L00028

The Clean Energy Regulator has informed me that those persons who need to use the *Renewable Energy (Method for Solar Water Heaters) Determination 2016* (the 2016 Determination) and/or the *NGER (Auditor Registration) Instrument 2016* (the 2016 Instrument) will already have access to the Australian Standards incorporated in those documents.

Members of the public who wish to know how many renewable energy certificates their solar hot water systems will receive can access alternative information on the Clean Energy Regulator website that does not require access to, or an understanding of, the Determination or Standards.

The Clean Energy Regulator is currently negotiating with SAI Global Pty Ltd (the distributor of the Standards on behalf of Standards Australia) to provide copies to members of the general public who are affected by, or have a genuine interest in and need to access the Standards to understand the operation of the 2016 Determination or the 2016 Instrument. The cost of provision of these copies would be met by the Clean Energy Regulator. Copies would be provided where a person has a genuine need and cannot otherwise access the Standards at no cost (for example, through libraries).

A full explanation is set out in the attached response at **Attachment B**. The Clean Energy Regulator would be happy to draft supplementary explanatory statements to provide this additional information.

Thank you for writing on these matters.

Yours sincerely

JOSH FRYDENBERG

Enc

EXPLANATORY STATEMENT

Environment Protection and Biodiversity Conservation Act 1999

Amendment of the List of Exempt Native Specimens in accordance with Section 303DC(1)

Section 303DB of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) provides for the establishment of a list of exempt native specimens. Specimens included in the list are exempt from the trade control provisions that apply to regulated native specimens.

The effect of this instrument is to amend the following entry in the list of exempt native specimens from:

- Marine shells of any taxa within the Phylum Mollusca except species of Tridacnidae.

to:

- Marine shells of any taxa within the Phylum Mollusca except species of Tridacnidae and Nautilidae.

Specimens listed on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) are not generally included in the list of exempt native specimens. The Nautilidae species was recently listed under CITES and therefore the amendment of the entry described above in the list of exempt native specimens will exclude the Nautilidae species. As a result exporters and importers will be subject to trade control provisions which apply to regulated native specimens.

Subsection 303DC(3) of the EPBC Act provides that before amending the list of exempt native specimens, the Minister for the Environment and Energy must consult such other Commonwealth minister or ministers and such other minister or ministers of each state and self-governing territory, as the minister considers appropriate. The Minister may also consult with such other persons and organisations as the minister considers appropriate. In this instance, the Delegate of the then Minister for the Environment had already consulted on the proposed listing of the Nautilidae species under CITES with the relevant Commonwealth, State and Territory fisheries agencies and commercial fishing industries and associations, commercial shell traders, and homewares and retail industry.

No additional consultation was therefore conducted for this amendment to the list of exempt native specimens, as the amendment is administrative in nature and is required as a consequence of listing Nautilidae under CITES, for which consultation was undertaken.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The instrument commenced on the day after it was registered on the Federal Register of Legislation.

STATEMENT OF COMPATIBILITY FOR A BILL OR LEGISLATIVE INSTRUMENT THAT DOES NOT RAISE ANY HUMAN RIGHTS ISSUES

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Amendment of List of Exempt Native Specimens

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The effect of this instrument is to amend the following entry in the list of exempt native specimens from:

- Marine shells of any taxa within the Phylum Mollusca except species of Tridacnidae.

to:

- Marine shells of any taxa within the Phylum Mollusca except species of Tridacnidae and Nautilidae.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Paul Murphy, Assistant Secretary, Wildlife Trade and Biosecurity Branch (Delegate of the Minister for the Environment and Energy)

Response from Clean Energy Regulator to Standing Committee on Regulations and Ordinances (SCRO) re: their 16 February 2017 letter to the Minister for the Environment and Energy about incorporating Australian Standards in the following instruments:

- *Renewable Energy (Method for Solar Water Heaters) Determination 2016*
- *National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2016*

SCRO's Request

The letter from SCRO refers to the 15 February 2017 SCRO delegated legislation monitor (No. 2 of 2017) which states, relevantly, in relation to the Solar Water Heater Instrument:

> *The committee notes that the determination incorporates a number of Australian Standards. While sections 5 and 7 of the determination specify the manner in which each of the standards is incorporated, with respect to accessibility, the ES states:*
>
> > *Australian Standards are available for purchase from Standards Australia Limited.*
>
> *The ES does not provide further information as to where the standards incorporated into the determination can be accessed for free.*
>
> *The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.*
>
> ***The committee requests the advice of the minister in relation to the above.***

and in relation to the Auditor Registration Instrument:

> *The committee notes that the instrument incorporates a number of Australian and international standards, as well as the 'International Handbook of Universities' (the handbook). While the ES is generally helpful in providing information about where documents incorporated into the instrument can be obtained, the ES states that the Australian and international standards and the handbook are available to purchase from the relevant publishers and does not provide information as to where these documents can be accessed for free.*
>
> *The committee's expectations in this regard are set out in the guideline on incorporation contained in Appendix 1.*

The SCRO guideline on incorporation referred to above states, relevantly:

> ***Committee's expectations***
>
> *The committee expects ESs to:*
>
> - *contain a description of incorporated documents; and*
> - *include information about where incorporated documents can be readily and freely accessed (for example, at a particular website).*
>
> *In this regard, the committee's expectations accord with the approach of the Senate Standing Committee for the Scrutiny of Bills, which has consistently drawn attention to provisions of bills that authorise material to be incorporated by reference, particularly where the material is not likely to be readily and freely available to the public.*

Generally, the committee will be concerned where incorporated documents are not publicly, readily and freely available, because persons interested in or affected by the law may have inadequate access to its terms. In addition to access for members of a particular industry or profession etc. that are directly affected by a legislative instrument, the committee is interested in the broader issue of access for other parties who might be affected by, or are otherwise interested in, the law.

The issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards, has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.[1] This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

Below are some examples of explanations provided in ESs with respect to access to incorporated documents which, with the appropriate justification, the committee has previously accepted:

- *copies of incorporated documents will be made available for viewing free of charge at the administering agency's state and territory offices;*
- *the relevant extracts from the incorporated documents are set out in full in the instrument or ES; or*
- *copies of incorporated documents will be made available free of charge to people affected by, or interested in, the instrument on request to the administering agency.*

Clean Energy Regulator response

Renewable Energy (Method for Solar Water Heaters) Determination 2016 ("the 2016 Determination")

1. The 2016 Determination replaces the *Renewable Energy (Electricity) Regulations 2001 – STC Calculation Methodology for Solar Water Heaters and Air Source Heat Pump Water Heaters – Determination March 2012* ("the 2012 Determination").

2. The purpose of the 2016 Determination is to set a new method for calculating the number of renewable energy certificates that may be created for a particular model of solar water heater. The changes provide additional flexibility and clarity for industry and were requested by industry. Solar water heaters can continue to be sold and installed without the need to use the 2016 Determination or claim renewable energy certificates under the Renewable Energy Target scheme.

3. Renewable energy certificates can be sold to entities with a liability under the Renewable Energy Target scheme (established by the *Renewable Energy (Electricity) Act 2000*). In this way, the Renewable Energy Target scheme provides an incentive to install more technologies which produce renewable energy (like solar panels) or displace electricity that would otherwise be used (like solar water heaters).

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[1] Thirty-Ninth Parliament, Report 84, Joint Standing Committee on Delegated Legislation, *Access to Australian Standards Adopted in Delegated Legislation* (June 2016) http://www.parliament.wa.gov.au/parliament/commit.nsf/all/6BCDA79F24A4225648257E3C001DB33F?opendocument&tab=tab3 (accessed on 10 January 2017).

4. It is only certain manufacturers or distributors[2] of solar water heaters that have chosen to apply to the Clean Energy Regulator to have models of solar water heaters registered in accordance with the 2012 Determination. Given the cost of equipment and technical expertise required to manufacture or test solar water heaters, the Clean Energy Regulator expects that it will continue to be only a limited number of manufacturers or distributors of solar water heaters that will choose to apply for registration in accordance with the 2016 Determination.

5. Like the 2012 Determination, the 2016 Determination incorporates a number of Australian Standards that are widely used in the construction, electricity and related industries. Incorporating the Standards avoids the possibility that (should the Standards be paraphrased or not explicitly mentioned) the Determinations may be inconsistent with other Commonwealth and State/Territory laws.

6. The Clean Energy Regulator expects that all relevant industry participants who would use the 2016 Determination will already have access to the incorporated Standards, for the following reasons:
    a. In November 2013 and February 2016 the Clean Energy Regulator consulted with the solar water heater industry on the proposed approach in the 2016 Solar Water Heater Determination. None of the received feedback raised the issue of accessibility or cost of Australian Standards;
    b. The 2012 Determination incorporated the same Standards. No-one, including those who were specifically consulted or made comments in 2013 and 2016, has previously expressed any concern around accessibility or cost of the Standards.
    c. A number of solar water heater industry participants are involved in the Standard setting process which entitles them to access that Standard for no cost;
    d. Compliance with a number of the Standards is required for other laws, such as the National Construction Code, or to obtain incentives under the Victorian Energy Efficiency Target. The National Construction Code also references a number of these Standards in setting requirements types of water heaters that may be installed in some dwellings;
    e. The majority of the users of the 2016 Determination would have used the 2012 Determination, which incorporated the same Standards.

7. The Clean Energy Regulator does not believe that the general public will use the 2016 Determination. The information they require (ie the number of certificates that their solar water heater system will be eligible for) is already published on the Clean Energy Regulator website.

8. The Solar Water Heater Determination incorporates the following Standards as a way to ensure product quality and the safety of Australian householders:

[2] Details can be found at: http://www.cleanenergyregulator.gov.au/RET/Scheme-participants-and-industry/Agents-and-installers/Small-scale-systems-eligible-for-certificates/Register-of-solar-water-heaters (accessed on 28 February 2017).

Item	Standard	Title	Accessible at no cost
1	AS 3498-2009	Authorization requirements for plumbing products – Water heaters and hot-water storage tanks	Available at no cost through National Library of Australia and interlibrary loan
2	AS 4552-2005 (as in force immediately before it was superseded)	Gas fired water heaters for hot water supply and/or central heating	Available at no cost through National Library of Australia and interlibrary loan
3	AS/NZS 2535.1:2007	Test methods for solar collectors – Part 1: Thermal performance of glazed liquid heating collectors including pressure drop	Available at no cost through National Library of Australia and interlibrary loan
4	AS/NZS 2712:2007	Solar and heat pump water heaters – design and construction	Available at no cost through National Library of Australia and interlibrary loan
5	AS/NZS 4234:2008 (as in force at the time it was made)	Heated water systems – Calculation of energy consumption	Available at no cost through National Library of Australia and interlibrary loan
6	AS/NZS 5125.1:2010 (as in force immediately before it was superseded)	Heat pump water heaters – Performance assessment – Part 1: Air source heat pump water heaters	Available at no cost through National Library of Australia and interlibrary loan
7	AS/NZS 4234:2008 Amendment 1	Amendment No. 1 to AS/NZS 4234:2008 Heated water systems—Calculation of energy consumption made in March 2011	Available at no cost through SAI Global (https://infostore.saiglobal.com/store/)
8	AS/NZS 4234:2008 Amendment 2	Amendment No. 2 to AS/NZS 4234:2008 Heated water systems—Calculation of energy consumption made in November 2011	Available at no cost through SAI Global (https://infostore.saiglobal.com/store/)

9. The Amendments referenced at items 7 and 8 of the above table are publically available at no cost at https://infostore.saiglobal.com/store/. The Clean Energy Regulator will also keep and make copies of these Amendments available at no cost upon request by members of the public who are affected by, or have a genuine interest in and need to access the relevant documents to understand the operation of the 2016 Determination and who are not otherwise able to download the Amendments for themselves. (A notice to this effect will be placed on the Clean Energy Regulator's website.)

10. The Standards referenced at items 1 – 6 are all publically available at the National Library of Australia and are available for interlibrary loan. Alternatively, they can be purchased at https://infostore.saiglobal.com/store/ for between $100 - $300. Due to copyright and licensing arrangements, the Regulator is unable to publish the Standards on its website.

11. Nonetheless, the Clean Energy Regulator is in the process of negotiating with SAI Global (the distributor of the Standards on behalf of Standards Australia) to enable the Regulator to make the relevant Standards available free of charge to members of the general public. The access arrangements would be available to members of the public who are affected by, or have a genuine interest in and need to access the relevant Standards to understand the operation of the 2016 Determination and who would not otherwise have free access to the Standards. The arrangement is likely to involve the Regulator paying a fee to SAI Global for

each copy provided and absorbing that cost within the Regulator's normal operating budget. Once the negotiation process is complete, the Clean Energy Regulator will publish details on its website explaining how to obtain copies of the various documents.

12. The Clean Energy Regulator would be happy to draft a supplementary explanatory statement to provide this additional information.

National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2016 ("the 2016 Instrument")

13. The 2016 Instrument sets out ways to meet the requirements for knowledge and experience suitable for registration as a greenhouse and energy auditor.

14. Greenhouse and energy auditors play an important assurance role in protecting the integrity of the National Greenhouse and Energy Reporting Scheme (under the *National Greenhouse and Energy Reporting Act 2007*) and the Emissions Reduction Fund (under the *Carbon Credits (Carbon Farming Initiative) Act 2011*).

15. The names of the auditors that have successfully registered as greenhouse and energy auditors are published on our website.[3]

16. Registering as a greenhouse and energy auditor is voluntary. Greenhouse and energy auditors are a small subset of the auditing industry.

17. The 2016 Instrument only applies to prospective greenhouse and energy auditors. Once an auditor has been registered as a greenhouse and energy auditor, they are governed by other legislative requirements. There are currently 125 registered greenhouse and energy auditors, down from a peak of 220 greenhouse and energy auditors registered in 2013-2014 during the years of the carbon pricing mechanism. The Clean Energy Regulator only receives 3-4 applications per year to be registered as a greenhouse and energy auditor. It is only those 3-4 applicants per year that would be directly affected by the 2016 Instrument.

18. The 2016 Instrument references a number of Australian and international auditing Standards.

19. It is industry practice that audit Standards are applied when conducting audits. Specifying that an auditor has experience and knowledge in relevant Standards, when applying for registration as a greenhouse and energy auditor, ensures that only appropriately qualified auditors can play an assurance role under the National Greenhouse and Energy Reporting scheme and the Emissions Reduction Fund scheme.

[3] Register of Greenhouse and Energy Auditors, available at http://www.cleanenergyregulator.gov.au/DocumentAssets/Pages/Register-of-Greenhouse-and-Energy-Auditors.aspx (as at 28 February 2017).

20. At the point of registration as a greenhouse and energy auditor, auditors should already be appropriately qualified and would already have had exposure and access to relevant Standards because auditing Standards set:
    - the responsibilities of an auditor when engaged to undertake an audit, and
    - the form and content of the auditor's report.

21. An auditor can register using the following incorporated Australian Audit Standards or International Audit Standards. Australian Audit Standards are available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au). International Audit Standards are available at no cost from the International Auditing and Assurance Standards Board website (www.iaasb.org).

Standard	Title	Accessible at no cost
Standard on Assurance Engagements ASAE 3000	*Assurance Engagements Other than Audits or Reviews of Historical Financial Information*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au).
Standard on Assurance Engagements ASAE 3100	*Compliance Engagements*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au).
Standard on Assurance Engagements ASAE 3410	*Assurance Engagements on Greenhouse Gas Statements*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au).
Standard on Related Services ASRS 4400	*Agreed-Upon Procedures Engagements to Report Factual Findings*	Available at no cost from the Auditing and Assurance Standards Board website (www.auasb.gov.au).
International Standard on Assurance Engagements 3000 (revised)	*Assurance Engagements Other than Audits or Reviews of Historical Financial Information*, set out in the *Handbook of International Quality Control, Auditing, Review, Other Assurance, and Related Services Pronouncements*	Available at no cost from the International Auditing and Assurance Standards Board website (www.iaasb.org)
International Standard on Assurance Engagements 3410	*Assurance Engagements on Greenhouse Gas Statements*	Available at no cost from the International Auditing and Assurance Standards Board website (www.iaasb.org)

22. The following international equivalent (ISO) Standards are incorporated by reference in to the 2016 Instrument to allow for a broader field of applicants:

Item	Standard	Title	Accessible at no cost
1	AS ISO 14064.2–2006	*Greenhouse gases Part 2: Specification with guidance at the project level for quantification and reporting of greenhouse gas emission reductions and removal enhancements*	Available at no cost through National Library of Australia and interlibrary loan
2	AS ISO 14064.3–2006	*Greenhouse gases Part 3: Specification with guidance at the project level for quantification and reporting of greenhouse gas reduction and removal enhancements*	Available at no cost through National Library of Australia and interlibrary loan
3	AS/NZS ISO	*Guidelines for auditing management*	Available at no cost through National Library

	19011:2014	*systems*	of Australia and interlibrary loan
4	ISO 14064-2:2006	*Greenhouse gases -- Part 2: Specification with guidance at the project level for quantification and reporting of greenhouse gas emission reductions or removal enhancements*	Identical to AS ISO 14064.2–2006, which is available at no cost through National Library of Australia and interlibrary loan
5	ISO 14064-3:2006	*Greenhouse gases -- Part 3: Specification with guidance for the validation and verification of greenhouse gas assertions*	Identical to AS ISO 14064.3–2006, which is available at no cost through National Library of Australia and interlibrary loan
6	ISO 19011:2011	*Guidelines for auditing management system*	Identical to AS/NZS ISO 19011:2014, which is available at no cost through National Library of Australia and interlibrary loan
7	ISO/IEC 17024:2012	*Conformity assessment -- General requirements for bodies operating certification of persons*	Identical to AS/NZS ISO/IEC 17024:2013, which is available at no cost through National Library of Australia and interlibrary loan

23. The ISO Standards referenced at items 1, 2, and 3 are available at no cost from the National Library of Australia and can be viewed by interlibrary loan. The Standards specified in items 1 and 4 and 2 and 5 and 3 and 6 are identical in content. Item 7 is identical in content to AS/NZS ISO/IEC 17024:2013, which is also available at no cost from the National Library of Australia. Each of the Standards can be purchased from SAI Global for between $160 - $220.

24. The Clean Energy Regulator is in the process of negotiating with SAI Global (the distributor of the Standards on behalf of Standards Australia) to enable the Regulator to make the relevant Standards available free of charge to members of the general public. The access arrangements would be available to members of the public who are affected by, or have a genuine interest and need to access the relevant Standards to understand the operation of the 2016 Instrument and who would not otherwise have free access to the Standards. The arrangement is likely to involve the Regulator paying a fee to SAI Global for each copy provided and absorbing that cost within the Regulator's normal operating budget. Once the negotiation process is complete, the Clean Energy Regulator will publish details on its website, explaining how to access the various documents.

25. The Regulator expects, for the reasons set out above and below, that auditors would not require access to the Standards through the Regulator to undertake their day to day business activities. Therefore, the Regulator does not intend to provide these Standards to industry participants at no cost. To do so could affect the commercially valuable intellectual property and financial viability of Standards.

26. The Clean Energy Regulator expects that all auditors who will use the 2016 Instrument will already have access to the incorporated Standards as part of their professional qualification and professional development. Further:

    a. the 2016 Instrument replaces the *National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2012*, which itself replaced the *National*

Greenhouse and Energy Reporting (Auditor Registration) Instrument 2010. Those instruments also incorporated equivalent Australian and international Standards;

b. there have been no complaints made to the Clean Energy Regulator about the cost of obtaining those incorporated documents during the lifetime of the 2010 or 2012 Instruments; and
c. no feedback has been received about an additional burden or cost of obtaining audit Standards through the multiple rounds of public consultation conducted with the industry since 2010.

27. The 2016 Instrument also incorporates the *International Handbook of Universities*. The Handbook is referenced as a way to give some objectivity to the Regulator's determination of the reputation of an overseas educational institution if a prospective greenhouse and energy auditor obtained their qualifications overseas (see section 6 of the 2016 Instrument). The Handbook was also referenced in the 2010 and 2012 instruments.

28. If a prospective auditor obtained their qualifications in Australia, a different test is applied, relying on the *Higher Education Support Act 2003,* which is available at no cost.

29. To date, the Regulator has had very few applications from auditors with overseas qualifications. Given the predicted 3-4 applications per year expected under the 2016 Determination, the Regulator believes that it will receive no more than one application per year from applicants with overseas qualifications. For these applicants, the Handbook is available for viewing at the Macquarie University Library or can be bought for $935. The Handbook is subject to general copyright law, which means the Clean Energy Regulator is restricted from republishing its contents in full.

30. The Clean Energy Regulator would be happy to draft a supplementary explanatory statement to provide this additional information.

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

PDR ID: MC17-000669

02 MAR 2017

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

John

Dear Senator Williams

Thank you for your letter of 16 February 2017 regarding the Senate Standing Committee on Regulation and Ordinance's Delegate Legislation Monitor No. 2 of 2017 and *CASA EX183/16 – Exemption – provision of a wind direction indicator* [F2016L02022].

I am advised by the Civil Aviation Safety Authority (CASA) that in response to concerns raised by the Standing Committee regarding similar instruments in the Delegated Legislation Monitor No. 1 of 2017, CASA subsequently identified that both EX183/16 and EX10/17 also required consultation statements to be included in their respective Explanatory Statements. I understand that replacement Explanatory Statements for each of these instruments including this information were registered on the Federal Register of Legislation on 15 February 2017.

Thank you again for taking the time to write and inform me of the Standing Committee's concerns on this matter.

Yours sincerely

DARREN CHESTER

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 9 February 2017 enclosing the Delegated Legislation Monitor (No 1 of 2017) and requesting my advice on the following instruments:

- *Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2016* [F2016L01829] (the Regulation)

- *Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2)* [F2016L01857] (the Declaration).

Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment Regulation 2016

In relation to the Explanatory Statement (ES) to the Regulation, the Standing Committee on Regulations and Ordinances (the Committee) has requested my advice on:

(i) the reference to Regulation 11D in the ES in respect of strict liability; and

(ii) the justification for applying strict liability to the existence of one element of the offences in Regulations 11B and 11C.

Reference to Regulation 11D in the ES

In relation to point (i), I would like to clarify that the reference to "Regulation 11D" referred to by the Committee should have been a reference to "Regulation 11C". I will amend the ES accordingly as soon as practicable.

Regulation 11B – Strict Liability

In relation to point (ii) and Regulation 11B, I note that strict liability does not apply to all of the elements of the offence. Rather, it only applies to the circumstance that the "sanctioned commercial activity" was not an "authorised commercial activity". As stated in Note 2 to Regulation 11B(4), "[a] sanctioned commercial activity is not an authorised commercial activity if it is not carried out in accordance with a permit under regulation 14G". The strict liability therefore effectively applies to the circumstance of a relevant permit not existing.

The Attorney-General's Department publication entitled *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that: "Applying strict … liability to a particular physical element of an offence may be justified where … [r]equiring proof of fault of the particular element … would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element".

In the case of the circumstance of a "sanctioned commercial activity" not being an "authorised commercial activity", it would not be appropriate to have to prove:

- Intention i.e. that the person believed that the "sanctioned commercial activity" was not an "authorised commercial activity" - this would be very difficult to show unless the person accused of the offence confessed to believing that the "sanctioned commercial activity" was not an "authorised commercial activity" (i.e. that no relevant permit existed) at the relevant time;
- Knowledge i.e. that the person was aware that the "sanctioned commercial activity" was not an "authorised commercial activity" - again, this would be very difficult to show unless the person accused of the offence confessed to being aware that the "sanctioned commercial activity" was not an "authorised commercial activity" (i.e. that no relevant permit existed) at the relevant time;
- Recklessness i.e. that the person was aware of a substantial risk that the "sanctioned commercial activity" was not an "authorised commercial activity" and, having regard to the circumstances known to him or her, it was unjustifiable to take the risk - in the context of this offence, there is no justification for undertaking a "sanctioned commercial activity" without a permit. Rather, if there is no relevant permit then the "sanctioned commercial activity" should not occur; or
- Negligence i.e. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that the "sanctioned commercial activity" was not an "authorised commercial activity", that the conduct merits criminal punishment – again, in the context of this offence, there is no justification (or "standard of care") for undertaking a "sanctioned commercial activity" without a relevant permit. Rather, if there is no relevant permit then the "sanctioned commercial activity" should not occur.

There are thus legitimate grounds for penalising persons lacking "fault" in respect of the element of a "sanctioned commercial activity" not being an "authorised commercial activity" i.e. that no relevant permit existed. As set out in the ES, the relevant question is only whether or not a permit exists. Requiring the additional proof of a "fault" element would be very difficult in the absence of a confession (in the cases of "intention" and "knowledge") or would be inappropriate (in the cases of "recklessness" and "negligence").

In addition, introducing a "fault" element to this element of the offence would appear to require that the person be aware of the detailed operation of the underlying law in order to be found to have committed an offence. This would make it extremely difficult to enforce the law and would make the law ineffective, particularly in the case of persons who were not aware of the relevant law or the precise manner in which it operated. Ignorance of the law should not be an excuse for undertaking an activity without a relevant permit. The burden should be on the person wishing to undertake the sanctioned commercial activity to be aware of the law and to comply with it.

Regulation 11C – Strict Liability

In relation to point (ii) and Regulation 11C, I note that strict liability does not apply to all of the elements of the offence. Rather, it only applies to the circumstance of whether the Minister has directed the person to close a bank account by a written notice under regulation 8B. The strict liability therefore effectively applies to the circumstance of a relevant notice existing. The Attorney-General's Department publication entitled *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that: "Applying strict … liability to a particular physical element of an offence may be justified where … [r]equiring proof of fault of the particular element … would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element".

In the case of the circumstance of the existence of a written notice under regulation 8B, it would not be appropriate to have to prove:

- Intention i.e. that the person believed that there was a written notice under regulation 8B - this could be difficult to show unless the person accused of the offence confessed to believing that there was a written notice under regulation 8B at the relevant time;
- Knowledge i.e. that the person was aware that there was a written notice under regulation 8B - again, this could be difficult to show unless the person accused of the offence confessed to being aware that there was a written notice under regulation 8B at the relevant time;
- Recklessness i.e. that the person was aware of a substantial risk that there was a written notice under regulation 8B and, having regard to the circumstances known to him or her, it was unjustifiable to take the risk - in the context of this offence, there is no justification for failing to comply with a notice. Rather, if there is a notice to close the bank account then the account should be closed; or
- Negligence i.e. such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that there was a written notice under regulation 8B, that the conduct merits criminal punishment – again, in the context of this offence, there is no justification (or "standard of care") for failing to comply with a notice. Rather, if there is a notice to close the bank account then the account should be closed.

In addition, a person who has been directed to close a bank account by a written notice under Regulation 8B is effectively put 'on notice' by the direction. The person has received sufficient notice of this obligation and has the opportunity to avoid unintentional contravention.

Thus, there are legitimate grounds for penalising persons lacking "fault" in respect of the element of a relevant notice existing. As set out in the ES, the relevant question is only whether or not a notice exists. Requiring the additional proof of a "fault" element should not be required.

I also note that strict liability allows a defence of honest and reasonable mistake of fact to be raised. Thus, an offence will not be committed if a person makes a reasonable and honest mistake as to a permit under regulation 14G not existing or the existence of a written notice under regulation 8B.

Finally, I would advise that the use of strict liability in respect of elements of offences under Australia's sanctions laws is not unusual. Attached is a table detailing where elements of offences under Australia's sanctions laws are subject to strict liability.

Charter of the United Nations (UN Sanction Enforcement Law) Amendment Declaration 2016 (No. 2)

The Committee has requested my advice on the inclusion of repealed regulations in Schedule 1 of the Declaration:

- Schedule 1, Item 4, regulation 11 of the *Charter of the United Nations (Sanctions – Cote d'Ivoire) Regulations 2008;* and
- Schedule 1, Item 19, regulation 4N of the *Customs (Prohibited Imports) Regulations 1956*.

UN Security Council (UNSC) Resolution 2153 (2014) removed the blanket prohibition on the importation of rough diamonds from Cote d'Ivoire. Regulation 4N of the *Customs (Prohibited Imports) Regulations 1956* which imposed the prohibition was repealed following the adoption of Resolution 2153 (2014). UNSC Resolution 2283 (2016) terminated the remaining UN sanctions on Cote d'Ivoire. Thus, in accordance with section 8 of the *Charter of the United Nations Act* 1945, Australia's domestic regulations giving effect to these sanctions – the *Charter of the United Nations (Sanctions – Cote d'Ivoire) Regulations 2008* – ceased to have effect.

I have now amended the Declaration and its ES to reflect the repeal of regulation 4N of the *Customs (Prohibited Imports) Regulations 1956* and the ceasing of effect of the *Charter of the United Nations (Sanctions – Cote d'Ivoire) Regulations* 2008.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
Charter of the United Nations (Sanctions—Somalia) Regulations 2008	**8. Prohibitions relating to a sanctioned supply:** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the making of the sanctioned supply is not authorised by a permit under regulation 9. **10 Prohibitions relating to a sanctioned service** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the provision of a sanctioned service is not authorised by a permit under regulation 11. **13 Prohibitions relating to dealings with designated persons or entities** (3) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under regulation 15. **14 Prohibitions relating to controlled assets** (3) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the use of or dealing with the asset is not authorised by a permit under regulation 15.
Charter of the United Nations (Sanctions—Central African Republic) Regulation 2014	**8. Prohibitions relating to a sanctioned supply:** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the making of the sanctioned supply is not authorised by a permit under regulation 9. **10 Prohibitions relating to a sanctioned service**

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
	(2) For an offence under section 27 of the Act that relates to a contravention of subsection (1), strict liability applies to the circumstance that the provision of the sanctioned service is not authorised by a permit under section 11. **11A Prohibition relating to dealings with designated persons or entities** (2) For an offence under section 27 of the Act that relates to a contravention of subsection (1), strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under section 11C. **11B Prohibition relating to controlled assets** (2) For an offence under section 27 of the Act that relates to a contravention of subsection (1), strict liability applies to the circumstance that the use of, or dealing with, the asset is not authorised by a permit under section 11C.
Charter of the United Nations (Sanctions—Democratic Republic of the Congo) Regulations 2008	**8. Prohibitions relating to a sanctioned supply:** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the making of the sanctioned supply is not authorised by a permit under regulation 9. **10 Prohibitions relating to a sanctioned service** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the provision of the sanctioned service is not authorised by a permit under regulation 11. **12 Prohibition relating to dealings with designated person or entity** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
	making available of the asset is not authorised by a permit under regulation 14. **13 Prohibition relating to controlled assets** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the use or dealing is not authorised by a permit under regulation 14.
Charter of the United Nations (Sanctions—Eritrea) Regulations 2010	**8 Prohibition of sanctioned supply** (2) Strict liability applies to the circumstance that the making of the sanctioned supply is not authorised by a permit under regulation 8A.
Charter of the United Nations (Sanctions—Iraq) Regulations 2008	**9 Return of illegally removed cultural property of Iraq** (3) A person commits an offence of strict liability if: (a) the person is directed under subregulation (2) to comply with specified arrangements; and (b) the person fails to comply with the arrangements.
Charter of the United Nations (Sanctions—Libya) Regulations 2011	**6 Prohibitions relating to a sanctioned supply** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the making of the sanctioned supply is not authorised by a permit under regulation 7. **9 Prohibitions relating to a sanctioned service** (2) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the provision of the sanctioned service is not authorised by a permit under regulation 10. **11 Prohibitions relating to dealings with designated persons or entities**

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
	(3) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under regulation 12C. **12 Prohibitions relating to controlled assets** (3) For an offence under section 27 of the Act that relates to a contravention of subregulation (1) by an individual, strict liability applies to the circumstance that the use of, or dealing with, the asset is not authorised by a permit under regulation 12C or 13A.
Charter of the United Nations (Sanctions—South Sudan) Regulation 2015	**5 Prohibition relating to dealings with designated persons or entities** (2) For an offence under section 27 of the Act that relates to a contravention of subsection (1) by an individual, strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under section 7. **6 Prohibition relating to controlled assets** (2) For an offence under section 27 of the Act that relates to a contravention of subsection (1) by an individual, strict liability applies to the circumstance that the use of, or dealing with, the asset is not authorised by a permit under section 7.
Charter of the United Nations (Sanctions—Sudan) Regulations 2008	**8 Prohibitions relating to a sanctioned supply** (1A) Strict liability applies to the circumstance that the making of the sanctioned supply is not authorised by a permit under regulation 9. **10 Prohibitions relating to the provision of sanctioned services** (1A) Strict liability applies to the circumstance that the provision of a sanctioned service is not authorised by a permit under regulation 11. **12 Prohibition relating to dealings with designated person or entity**

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
	(1A) Strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under regulation 14. **13 Prohibition relating to sanctions controlled assets** (1A) Strict liability applies to the circumstance that the use of or dealing with the asset is not authorised by a permit under regulation 14.
Charter of the United Nations (Sanctions—the Taliban) Regulation 2013	**9 Prohibition relating to dealings with designated persons or entities** (2) Strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under section 11. **10 Prohibition relating to controlled assets** (2) Strict liability applies to the circumstance that the use of or dealing with the asset is not authorised by a permit under section 11.
Charter of the United Nations (Sanctions—Al-Qaida) Regulations 2008	**10 Prohibition relating to dealings with designated persons or entities** (1A) Strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under regulation 12. **11 Prohibition relating to controlled assets** (1A) Strict liability applies to the circumstance that the use of or dealing with the asset is not authorised by a permit under regulation 12.
Charter of the United Nations (Sanctions—Yemen) Regulation 2014	**5 Prohibition relating to dealings with designated persons or entities** (2) For an offence under section 27 of the Act that relates to a contravention of subsection (1), strict liability applies to the circumstance that the making available of the asset is not authorised by a permit under section 7.

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
	6 Prohibition relating to controlled assets (2) For an offence under section 27 of the Act that relates to a contravention of subsection (1), strict liability applies to the circumstance that the use of, or dealing with, the asset is not authorised by a permit under section 7.
Autonomous Sanctions Regulations 2011	**12 Prohibitions relating to a sanctioned supply** (1A) Strict liability applies to the circumstance that the sanctioned supply is not in accordance with a permit under regulation 18. **12A Prohibitions relating to sanctioned import** (1A) Strict liability applies to the circumstance that the sanctioned import is not in accordance with a permit under regulation 18. **13 Prohibitions relating to the provision of sanctioned services** (1A) Strict liability applies to the circumstance that the sanctioned service is not in accordance with a permit under regulation 18. **13A Prohibitions relating to engaging in sanctioned commercial activity** (1A) Strict liability applies to the circumstance that the sanctioned commercial activity is not in accordance with a permit under regulation 18. **14 Prohibition of dealing with designated persons or entities** (1A) Strict liability applies to the circumstance that the making available of the asset is not in accordance with a permit under regulation 18. **15 Prohibition of dealing with controlled assets**

Examples of strict liability applying to elements of an offence in other Australian sanctions laws

Regime	Strict liability elements
	(1A) Strict liability applies to the circumstance that the use or dealing with the asset is not in accordance with a permit under regulation 18.
Charter of the United Nations Act 1945	**20 Offence—dealing with freezable assets** (2) Strict liability applies to the circumstance that the use or dealing with the asset is not in accordance with a notice under section 22. **21 Offence—giving an asset to a proscribed person or entity** (2) Strict liability applies to the circumstance that the making available of the asset is not in accordance with a notice under section 22.

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-000652

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

Request from the Standing Committee on Regulations and Ordinances regarding the *Code for the Tendering and Performance of Building Work 2016* [F2016L01859]

Thank you for your letter of 9 February 2017 on behalf of the Standing Committee on Regulations and Ordinances (the Committee) concerning section 18 of the *Code for the Tendering and Performance of Building Work 2016* (the Code).

The Committee has sought my advice about whether a decision to impose an exclusion sanction on a code covered entity under section 18 of the Code should be subject to merits review by a judicial or other independent tribunal.

Section 19 of the Code protects the integrity of the decision-making process in relation to exclusion sanctions by outlining a number of steps that must be taken before a decision to issue an exclusion sanction is made. It provides that written notice must be given to the code covered entity detailing the alleged breach of the Code and inviting the entity to make a submission in relation to the matter within 21 days. If a submission is made, that submission must be considered before a decision to impose an exclusion sanction is made.

I note that a decision to impose an exclusion sanction would be amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, which is an appropriate review mechanism for these decisions.

Yours sincerely

Senator the Hon Michaelia Cash
21 / 2 / 2017

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-000516

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John,

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 9 February 2017 concerning Delegated legislation monitor 1 of 2017, in which the Committee requested further information in relation to the *Customs and Migration Legislation Amendment (2016 Measures No.1) Regulation 2016* [F2016L01904].

This Regulation amends the *Customs Regulation 2015* and the *Migration Regulations 1994* to create a mechanism which allows the Commonwealth to charge fees for performing functions relating to certain international travellers using gateway airports in a special processing area, at the request of a person or persons.

Industry stakeholders identified commercial demand for this type of service and sought support from government to provide border clearance services to allow them to create new product offerings and increase their international competiveness. Subsequently, government agreed to provide border clearance services in dedicated areas separate to general traveller processing on a user-pays basis. There is no obligation for industry participants to establish these services within their business.

The Committee sought additional information in relation to the basis for determining fees involved in this regulation, namely:

- whether the basis for the agreed fees will, in fact, reasonably reflect the cost of providing the service; and

- whether the agreed fees for the provision of priority border clearance services will be set by legislative instrument or otherwise made publically available.

In response to the first question I can confirm that the fees involved in the Regulation will reasonably reflect the cost of providing the service to international travellers who request this service.

A value-based pricing model will apply to the provision of this service, consistent with the Australian Government Charging Framework. The specific fees involved will be established through individual agreements with each service provider offering the service to their passengers. The service provider will then charge passengers who request the service on an opt-in, voluntary basis. Only passengers who choose to use the service will be required to pay this fee. The general public will not be subject to the charge unless they choose to use the premium service offered by industry.

Capital and set up costs for this service will be borne by service providers. The fees charged by the Department will assist the Department to recover costs for managing and administering the service and recruiting, training and deploying officers and equipment required to process passengers, without adversely affecting existing border clearance and passenger processing activities.

In response to the second question I confirm that the fees for this service will not be set by legislative instrument. The government will enter into contractual agreements with industry service providers that define the service commitment, pricing, minimum term, payment terms and method.

Contracts will be negotiated on a case-by-case basis with each airport operator, as service demand is determined by industry and the associated costs involved are identified by government. Commercial charges will be set and administered consistent with the Australian Government Charging Framework. These agreements will not be publicly available as they will be subject to commercial-in-confidence classification.

Thank you again for bringing this matter to my attention. I trust the information provided is helpful.

Yours sincerely

10/03/17

PETER DUTTON

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC17-001122

27 FEB 2017

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your correspondence of 9 February 2017 requesting advice on instruments within my portfolio responsibility that have been identified in the *Delegated legislation monitor* No. 1 of 2017.

For ease of reference, responses to each of the committee's issues are addressed in the enclosed documents.

Thank you again for your letter.

Yours sincerely

Barnaby Joyce MP

Enc.

***Export Control (Plants and Plant Products - Norfolk Island) Order* 2016 [F2016L01796]**

Insufficient information regarding strict liability offences

I note that the committee generally requires a detailed justification for the inclusion of strict liability offences in delegated legislation.

On 1 July 2016 a number of legislative changes came into effect which extended some Commonwealth legislation to Norfolk Island. One of the Acts extended to Norfolk Island was the *Export Control Act 1982*. To support Norfolk Island's $1 million dollar export industry the *Export Control (Plants and Plant Products – Norfolk Island) Order 2016* (Norfolk Order) was made under the *Export Control Act 1982* to enable the Department of Agriculture and Water Resources to provide certification for exports of plants and plant exports from Norfolk Island

In order to provide a consistent export regulatory regime between Australia and Norfolk Island and not give undue advantage, it was considered important to maintain consistency between the *Export Control (Plants and Plant Products) Order 2011* (Plant Order) and the Norfolk Order. This includes the strict liability offences in sections 9 and 13, which reflect the strict liability offences outlined in sections 44 and 48 of the Plant Order.

The government considers these provisions are consistent with principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers 2011* (Guide) as the provisions underpin the Australian export regulatory regime, and to a lesser extent, protect general revenue through the export of plants and plant products. The penalties for the offences have been set at 20 penalty units for the offence of altering a certificate in section 13 and 50 penalty units for the offence of issuing a false certificate in section 9. The offences therefore meet the requirement in the Guide that strict liability offences should not exceed 60 penalty units for an individual.

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements providing justification for the use of strict liability offences.

***Export Control (Plants and Plant Products - Norfolk Island) Order* 2016 [F2016L01796]**

Incorporation of extrinsic material

Consistent with subsection 14(1) of the *Legislation Act 2003*, the intention is for references to the International Plant Protection Convention of the Food and Agriculture Organization of the United Nations (IPPC) to be read as in force at a particular time. In this case, the IPPC would be incorporated as at the date that the *Export Control (Plants and Plant Products - Norfolk Island) Order* 2016 was made (8 November 2016).

I am aware that the Committee places considerable reliance on explanatory statements to explain legislative instruments and the incorporation of extrinsic materials. I have requested that, where possible, the department include additional information in explanatory statements addressing the manner in which extrinsic material has been incorporated.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC17-000686

Senator John Williams
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 16 February 2017 sent to my office seeking further information about an item in the *Financial Framework (Supplementary Powers) Amendment (Industry, Innovation and Science Measures No. 2) Regulation 2016*.

The Minister for Industry, Innovation and Science, Senator the Hon Arthur Sinodinos AO, has provided a response to the Committee's request at Attachment A.

I trust this advice will assist the Committee with its consideration of this matter.

I have copied this letter to the Minister for Industry, Innovation and Science.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

15 March 2017

ATTACHMENT A

Provided by the Minister for Industry, Innovation and Science

Response to the Senate Standing Committee on Regulations and Ordinances

National Science Week and strategic science communication activities

The development of the National Science Week and strategic science communication activities program and the drafting of item 159 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* were undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objective of the item references the following heads of legislative power:

- the Commonwealth executive power and the express incidental power;
- the power to make special laws for people of any race;
- the statistics power;
- the communications power;
- the astronomical and meteorological observations power;
- the external affairs power;
- the territories power;
- the power to make grants to the States; and
- the trade and commerce power.

National Science Week

Commonwealth executive power and the express incidental power

Section 61 of the Constitution, together with section 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

National Science Week is Australia's preeminent national celebration of science, seeking to provide high profile science engagement across the nation, in which the whole of the Australian community can participate. It aims to reach as many Australians as possible with a positive message about the impact science has on our lives, the Australian economy, our nation's society, and the rest of the world. It is also an important opportunity for the Australian science community to celebrate and showcase science to the Australian public and the rest of the world.

The Australian Government provides National Science Week Grants to meritorious and high profile science engagement projects across all states and territories, and supports projects that stimulate and leverage further contributions to science by organisations across Australia.

Given its truly national focus on advancing the Australian community's engagement and participation in science, technology, engineering and mathematics (STEM) across all state and territory jurisdictions, it is considered that National Science Week is a nationally significant activity.

Power to make special laws for people of any race

The races power supports laws with respect to Indigenous Australians. National Science Week Grants support projects with a particular focus on engaging Indigenous Australians. For example, in 2016, this included support for the Indigenous Science Experience Family Science Fund Day, which celebrated Indigenous and Western science and Indigenous youth and elder achievements, and demonstrated the value of traditional and customary Indigenous knowledge in science and technology and the relevance of science to our daily lives.

Statistics power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

The National Science Week Grants support citizen science projects involving amateur or non-professional scientists collecting or analysing data, and formulating research questions and design, usually working with a professional scientist. Funding of $85,000 per year in addition to the competitive grant round is allocated to support a national citizen science project as part of National Science Week and a national website that collects data. Funding is provided for citizen science projects that are designed to collect, analyse and disseminate science data (for example in relation to bird and mammal populations).

Communications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Citizen science has a focus on the use of the internet as a means of engaging and communicating with Australians about science projects. For example, in 2016, funding under this initiative supported the Wildlife Spotter citizen science project, which involved the establishment of an online web portal available to all sectors of the Australian community. Individuals across Australia were encouraged to register online to classify images of wildlife taken by movement-triggered cameras set up by scientists. The project resulted in over 2.8 million images being processed, with more than 3.4 million animals identified, all using the internet.

Astronomical and meteorological observations power

Section 51(vii) of the Constitution permits the Commonwealth Parliament to make laws with respect to 'astronomical and meteorological observations'. National Science Week Grants projects (including relevant citizen science projects) may span scientific subject matters that include projects related to documenting and recording data from astronomy projects.

External affairs power

The external affairs power supports legislation implementing treaties to which Australia is a party. Under the National Science Week initiative, National Science Week Grants may be provided to support projects that include activities which give effect to Australia's obligations under international treaties. This includes activities contemplated by the following treaties.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to enjoy the benefits of scientific progress and its applications, and for government parties to take steps necessary for the conservation, development and diffusion of science and culture.

Articles 7, 12 and 13 of the Convention on Biological Diversity obliges parties to conduct activities which are directed to promoting the community's understanding of the importance of biodiversity, measures that can be undertaken to conserve biodiversity, and projects directed at contributing to the identification, conservation or sustainable use of biodiversity.
Articles 4 and 6 of the United Nations Framework Convention on Climate Change requires parties to undertake activities directed at improving knowledge and understanding of climate change and its effects.

Article 4 of the Ramsar Convention requires parties to conduct activities directed towards improving knowledge of wetlands and their flora and fauna.

Articles 5, 17 and 19 of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, obliges parties to conduct activities which contribute to an increased knowledge of the processes leading to desertification and drought, investigating ways of mitigating the effects of drought, and sustainable use and management of the natural resources of affected areas.

The external affairs power also supports legislation with respect to places, persons, matters or things outside the geographical limits of Australia. Citizen science projects (including nationally significant citizen science projects supported through National Science Week) may include activities outside Australia, for example activities directed at water quality, plants or animals seaward of the low water mark.

Strategic Science Communication Activities

1. Science tourism capacity building

Territories power

The provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

Funding of $49,500 (incl. GST) has been provided to the Canberra Innovation Network, based in the ACT, to develop a national framework for science tourism that helps to build Australia's profile as a science and innovation nation. Once the framework is

complete, roundtables will be hosted in the ACT and Northern Territory to discuss local implementation in other states and territories. A pilot may also be undertaken in the ACT to demonstrate implementation strategies to other states and territories.

Funding may also be provided to the ACT government or the Northern Territory government to support specific science tourism activities and to support the implementation of the national science tourism framework.

Power to make grants to the states

Section 96 of the Constitution enables the Parliament to grant financial assistance to States. Funding under this element may be provided to the states to support specific science tourism activities and to support the implementation of the national science tourism framework.

Communications power

Under s 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Funding under this element will have a strong focus on the use of the internet and development of online resources. The science tourism roundtables mentioned above may be streamed online to enable individuals and organisations in other locations to participate via the internet. Funding may also be provided to support the development of web-based applications and other downloadable resources to enable local state and territory tourism experiences to be made available from other parts of Australia, or otherwise enhanced, via the internet.

Trade and commerce power

Section 51(i) of the Constitution supports legislation with respect to 'trade and commerce with other countries, and among the States'.

A key aim of the science tourism activities, particularly through the development of a national science tourism framework, is to facilitate overseas and interstate trade and commerce by facilitating international and inter-jurisdictional tourism.

External affairs power

Funding under this element may be used to support the development of vocational guidance and training programmes related to science tourism.

The external affairs power supports legislation implementing treaties to which Australia is a party.

Article 6(2) of ICESCR relates to supporting technical and vocational guidance and training programmes, policies and techniques to support full and productive employment.

Articles 1 and 2 of the International Labour Organization's Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources also requires parties to adopt and develop comprehensive and co-ordinated policies and programmes of vocational guidance and vocational training.

2. Decision-maker engagement

Territories power

The provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

Funding under this element has been provided to Science Technology Australia to undertake events wholly in the ACT which will bring together scientists and decision-makers like Parliamentarians. Funding may also be provided to the ACT or Northern Territory to support other activities related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

Power to make grants to the states

Section 96 of the Constitution enables the Parliament to grant financial assistance to States. Funding under this element may be provided to the states to support activities related to broadening decision-makers' engagement with STEM, evidence-based decision-making and Australian scientists.

3. Equity of Access

The Equity of Access element comprises three separate funding components. The first supports the Questacon Transport Assistance Programme (QTAP). The second component of the Equity of Access programme provides support for the development of a low vision project. The final component of the Equity of Access programme provides funding for a travelling outreach programme focusing on STEM, namely the Shell Questacon Science Circus.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by s 122 of the Constitution.

The QTAP programme subsidises the costs associated with transportation to and from Questacon from within the ACT for socially disadvantaged groups including migrants, refugees, people with a disability and people in aged care.

The support for the development of a low vision project is also to be undertaken wholly at Questacon in the ACT. Questacon is currently working with the Royal Blind Society to develop a community engagement project to open Questacon exhibitions in the ACT to the low vision community.

Funding for the Shell Questacon Science Circus is provided to the Australian National University, based in the ACT, to deliver pop-up interactive exhibits and learning experiences for children in preschools, primary schools, and secondary schools in remote and regional communities across Australia.

Commonwealth executive power and the express incidental power

Section 61 of the Constitution, together with section 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Shell Questacon Science Circus is a national STEM outreach equity programme designed to ensure that Australians who would probably not otherwise be able to visit Questacon – the National Science and Technology Centre – can still access some of the benefits of this national institution. Delivering STEM education across all states and territories, it is considered an activity best performed by the Commonwealth of Australia.

Power to make special laws for people of any race

The races power supports laws with respect to Indigenous Australians. Funding under the Equity of Access programme is provided to support the Shell Questacon Science Circus to conduct visits to remote Indigenous communities.

External affairs power

The external affairs power supports legislation implementing treaties to which Australia is a party.

Article 29 of the Convention on the Rights of the Child requires parties to conduct activities directed to the development of children, particularly educational activities. The Shell Questacon Science Circus delivers teacher professional development workshops to support students' STEM outcomes. It also benefits children by contributing to their development, as well as assisting school teachers or parents (or a child's legal guardian) to undertake activities in the classroom or at home to improve a child's understanding of science.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MS17-000170

Senator John Williams
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 10 November 2016 sent to my office seeking further information about certain items in the *Financial Framework (Supplementary Powers) Amendment (Agriculture and Water Resources Measures No. 3) Regulation 2016*.

The Deputy Prime Minister and Minister for Agriculture and Water Resources, the Hon Barnaby Joyce MP, has provided a response to the Committee's request at Attachment A. I have provided the Deputy Prime Minister with a copy of this letter.

I trust this advice will assist the Committee with its consideration of this matter.

Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

27 February 2017

Attachment A

Provided by the Deputy Prime Minister and Minister for Agriculture and Water Resources

Response to the Committee's questions about the 'Tactics for Tight Times' program

I thank the Committee for its question in relation to the Tactics for Tight Times program.

The development of this program and the drafting of item 172 of Schedule 1AB to the Financial Framework (Supplementary Powers) Regulations was undertaken having regard to a range of constitutional and other legal considerations. As indicated in the explanatory statement, the objectives of the item reference a number of heads of legislative power, namely:

- the trade and commerce power;
- the territories power;
- the external affairs power;
- the Commonwealth executive power; and
- the communications power.

The objective of the item refers, in particular, to Australia's international obligations under the International Covenant on Economic, Social and Cultural Rights, particularly Article 11. Article 11(2)(a) provides for state parties, recognising the fundamental right of everyone to be free from hunger, to take measures which are needed to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, and by developing or reforming agrarian systems.

The Commonwealth has provided a one-off payment of $900,000 to Dairy Australia Limited (Dairy Australia) to expand its delivery of the Tactics for Tight Times program (TFTT) as part of the Government's Dairy Support Package. The Dairy Support Package received bipartisan support and was an important and timely response to address immediate issues impacting dairy farmers as a result of retrospective price cuts by Murray Goulburn and Fonterra.

The TFTT program provides a range of tools, including information and one-on-one advice, to dairy farmers affected by the drop in farm gate milk price.

The funding is providing information, services and activities to assist dairy farmers dealing with challenging conditions in the dairy market.

The TFTT program will assist dairy farmers to continue to produce dairy products, including products which are produced for interstate sale or for export from Australia.

The program supports dairy farmers in south eastern Australia and is available to farmers whether they are located in states or territories.

The program involves the dissemination of information to dairy farmers, including scientific and technical knowledge, which is designed to assist them in improving methods of production and their output.

Providing timely assistance to help maintain a viable dairy industry, in light of challenging conditions, benefits the nation as a whole. Dairy is Australia's third largest rural industry. Approximately 38,000 people are directly employed in the industry, including 6,100 dairy farmers. The TFTT program supports these farmers.

To ensure the information relevant to the TFTT program is communicated broadly and appropriately, dairy farmers have access to a range of online communications resources such as factsheets, case studies, videos and other online communications tools through the Dairy Australia website.

This answer is provided on the understanding that successive governments have been careful to avoid action that might effectively waive legal privilege in legal advice and thereby potentially prejudice the Commonwealth's legal position.

TREASURER

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

Thank you for your letter of 15 February 2017 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) requesting advice in relation to the *Financial Sector (Collection of Data) (reporting standard) determination No. 1 of 2017 - Reporting Standard SRS 534.0 Derivative Financial Instruments* (the Instrument).

I raised the Committee's concern with the Australian Prudential Regulation Authority (APRA), which is responsible for the Instrument. I noted that the Committee sought advice on whether the Instrument has had a detrimental effect on individuals as a result of its retrospective commencement; and that the impact of retrospectivity is usually addressed in the explanatory statement (ES) to the Instrument.

APRA has undertaken to revise the ES to make clear that the Instrument's retrospective application did not disadvantage the rights of, or impose a liability on, any person for an act or omission that took place before the date of registration.

The Instrument was made on 5 January 2017, with a commencement date of 1 July 2016. It revoked a pre-existing Instrument (*Financial Sector (Collection of Data) (reporting standard) determination No. 39 of 2015 - Reporting Standard SRS 534.0 Derivative Financial Instruments*) which was made on 10 December 2015, and commenced 1 July 2016; and re-made it with one change: the inclusion of an additional option of "not applicable" at item 3 of Form SRF 534.0. Both versions of the Instrument required registrable superannuation entities (RSEs) to report in relation to any derivative financial instruments held.

The use of the 1 July 2016 commencement date for the re-made Instrument was intended to reduce confusion about which reporting periods it covered.

Form SRF 534.0 is an annual form and must be submitted to APRA within 3 months of the end of the RSE's year of income. The vast majority of RSEs have a year of income which ends on 30 June. For these RSEs, the obligation to report under the re-made Instrument has not yet commenced in practical terms, i.e. these RSE licensees will be required to submit the form by 30 September 2017, for the year ending 30 June 2017.

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While there are two RSEs with non-30 June balance dates and for whom the obligation to report occurred prior to the registration of the latest version of the Instrument, APRA has established that neither of these RSEs were affected by the change, as neither held derivative financial instruments and they both provided "nil" returns. APRA is therefore satisfied that no person's rights were adversely affected by the 1 July 2016 commencement date.

Yours sincerely

The Hon Scott Morrison MP

14 / 3 / 2017

Parliament House Canberra ACT 2600 Australia
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Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-000786

Senator John Williams
Chair
Senate Regulation and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

02 MAR 2017

Dear ~~Senator~~ John,

Thank you for your letter of 16 February 2017 drawing my attention to the Committee's Delegated Legislation Monitor No. 2 of 2017. The Committee is seeking my response in relation to issues identified with respect to a legislative instrument, Higher Education Provider Approval No 5 of 2016 (F2016L02008) (the instrument).

The Committee notes that the instrument incorporates an external document, the 'Financial Viability Instructions' (FVI), and that neither the text of the instrument nor its explanatory statement (ES) explains what the FVI document is and how it may be obtained. I now advise:

- Section 19-5 of The *Higher Education Support Act 2003* (the Act) requires that an organisation (applicant or approved provider allowed to offer loans under the FEE-HELP scheme) is financially viable and likely to remain financially viable. The FVI informs organisations of the financial information that is required to be submitted, the form in which it must be prepared, and how financial viability will be assessed, thereby assisting them to prepare those parts of their application or annual financial submissions that relate to financial viability

- The instrument incorporates the FVI as part of the standard conditions with which providers are required to comply once approval to offer loans under the FEE-HELP scheme is granted.

The Committee has noted that the FVI are available at no cost online on the Department of Education and Training's website and that, where an incorporated document is available online, the Committee considers that a best-practice approach is for an instrument's ES to provide details of the website where the document can be accessed.

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Canberra
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I remain committed to ensuring that non-statutory material incorporated by reference is easily ascertainable and that persons interested in, or likely be affected by, the terms of the referenced material can readily identify and access such material. Providing a clear description of the document referred to and specifying where such a document is located supports this important objective. The matters raised by the Committee will be addressed in all future higher education provider approvals.

I thank the Committee for bringing this matter to my attention.

As requested a copy of this letter has also been emailed to regords.sen.aph.gov.au.

Yours sincerely

Simon Birmingham

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC17-020194

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair John

I refer to the request made by the Senate Standing Committee on Regulations and Ordinances (the Committee) on 16 February 2017 for information about scrutiny issues identified in relation to the *Indigenous Student Assistance Grants Guidelines 2017* [F2017L00036] (the Guidelines). I would like to thank the Committee for seeking my advice on these Guidelines.

The Guidelines provide a framework to deal with Indigenous Student Success Programme (ISSP) grants to higher education providers under Part 2-2A of the *Higher Education Support Act 2003* (the Act). The ISSP complements mainstream higher education funding, targeting improvements to the numbers of Aboriginal and Torres Strait Islander people participating in and successfully progressing through university and graduating.

The Committee has requested my advice in relation to merits review of the decision of a higher education provider to terminate an Indigenous Commonwealth Scholarship under section 26 of the Guidelines.

Providers are subject to the *Higher Education Standards Framework (Threshold Standards) 2015* in making a decision to terminate an Indigenous Commonwealth Scholarship. Relevantly, the Threshold Standards establish the minimum acceptable requirement for student grievances and complaints in relation to the provision of higher education. The Threshold Standards require providers to maintain a review process and to engage a third party if the internal review process is unsuccessful.

Decisions about scholarships issued under other parts of the Act are also subject to the Threshold Standards.

Further information on these requirements are set out in Attachment A.

I trust this information is of assistance to the Committee. Should the Committee require further information on this issue, the relevant contact in my Department is Mr Glen Hansen, Senior Adviser, Tertiary Education and Policy Coordination Branch.

Yours sincerely

NIGEL SCULLION

6 / 3 / 2017

Attachment A

Requirements for terminating ISSP scholarships

The Indigenous Student Assistance Grants Guidelines 2017

The *Indigenous Student Assistance Grants Guidelines 2017* (the Guidelines) became operational on 11 January 2017. The Guidelines provide a framework to deal with Indigenous Student Success Programme (ISSP) grants to higher education providers under Part 2-2A of the *Higher Education Support Act 2003* (the Act).

The ISSP complements mainstream higher education funding, targeting improvements to the numbers of Aboriginal and Torres Strait Islander people participating in and successfully progressing through university and graduating.

Section 26 of the Guidelines provides for the following two decisions to be made in relation to termination of an Indigenous Commonwealth Scholarship.

- Subsection 26(1) of the Guidelines provides that a higher education provider must terminate an Indigenous Commonwealth Scholarship if the scholarship recipient ceases to be 'enrolled in a course of study with the provider';
- Subsection 26(2) of the Guidelines provides that a higher education provider may terminate an Indigenous Commonwealth Scholarship if the scholarship recipient fails to comply with a condition of the scholarship.

An Indigenous Commonwealth Scholarship is a scholarship of a type described in section 20 of the Guidelines, and is awarded by a higher education provider to an Indigenous student using an ISSP grant, and on the terms and conditions determined by the provider.

Section 36 of the Guidelines requires a higher education provider that receives a grant under the Guidelines to make information publicly available that advises, relevantly, Indigenous students of the procedures for dealing with grievances and making complaints about the use of a grant by the provider. This is broad enough to cover decisions relating to scholarships, including termination. A note to section 36 of the Guidelines references paragraph 2.4 of the Threshold Standards (see below).

The Higher Education Standards Framework

A decision of a higher education provider to terminate an Indigenous Commonwealth Scholarship under either subsection 26(1) or subsection 26(2) of the Guidelines is a decision to which paragraph 2.4 of the Higher Education Standards Framework (the Framework) would apply in the case of an aggrieved student. Paragraph 2.4 of the Framework establishes the minimum acceptable requirement for student grievances and complaints in relation to the provision of higher education by a higher education provider. Of particular relevance to the Committee's inquiry:

- Subparagraph 2.4(1) of the Framework requires a higher education provider to have mechanisms for students to resolve grievances about any aspect of their experience with the provider, its agents or related parties; and
- Subparagraph 2.4(3) of the Framework provides that institutional complaints-handling and appeals processes for formal complaints must include provision for review by an appropriate independent third party if internal processes fail to resolve a grievance.

Paragraph 2.4 of the Framework applies to a decision under subsection 26(1) of the Guidelines even though the decision flows automatically from the cessation of the scholarship recipient's enrolment.

The Framework is provided for in the *Higher Education Standards Framework (Threshold Standards) 2015* (Threshold Standards), which are made by the Minister for Education and Training under subsection 58(1) of the *Tertiary Education Quality Standards Agency Act 2011* (TEQSA Act). Subsection 38-25 of the Act applies the Threshold Standards to higher education providers who receive an ISSP grant under the Guidelines as follows:

- Subparagraph 38-25(1)(a)(ii) of the Act provides that a grant under the Guidelines is made to a higher education provider on the condition that the provider meet the quality and accountability requirements set out at section 19-1 of the Act;
- The quality and accountability requirements include the quality requirements specified in section 19-15 of the Act;
- Under paragraph 19-15(a) of the Act, a provider must operate, and continue to operate, at a level of quality that meets the Threshold Standards within the meaning of the *Tertiary Education Qualification Standards Agency Act 2011* (including meeting the minimum requirements set out in the Framework);
- As a quality and accountability requirement, a higher education provider that fails to comply with the Threshold Standards may have its approval as a provider revoked under subparagraph 22-15(1)(a)(ii) of the Act, and various other sanctions are provided for in Part 7 of the TEQSA Act for failing to comply with the Threshold Standards (including the Framework).

The arrangements provided for in the Framework for dealing with complaints or grievances relating to the Indigenous Commonwealth Scholarships provided for in the Guidelines are consistent with arrangements for Commonwealth Scholarships provided for in the *Commonwealth Scholarships Guidelines (Education) 2010* made for Part 2-4 of the Act. The Framework ensures that there is an appropriate mechanism in place for review of decisions of higher education providers to terminate Commonwealth Scholarships, including the Indigenous Commonwealth Scholarships provided for in the Guidelines.

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

PDR ID: MC17-000562

22 FEB 2017

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the letter from the Committee Secretary of 9 February 2017 regarding various instruments included in the Senate Standing Committee on Regulations and Ordinances Delegated Legislation Monitor No 1 of 2017.

Airports Amendment (Airport Sites) Regulations 2016 [F2016L01810]
The Committee was concerned that the Explanatory Statement (ES) for the instrument failed to adequately explain the nature of consultation undertaken.

The Department of Infrastructure and Regional Development has advised consultation was undertaken with all Airport Lessee Companies (ALCs) through written correspondence. Each ALC responded to a request from the Department providing their consent to the amendment or questions about the list of proposed airport site variations, which were addressed prior to their consent being given.

The ES will be updated to include information on the nature of consultation that was undertaken and registered as soon as practicable.

Marine Order 32 (Cargo handling equipment) 2016 [F2016L01935]
The Committee noted that subsection 13(4) of Schedule 3 to the Order requires that 'material, design, manufacture, marking, testing and certification of flat synthetic-webbing slings must comply with the relevant Australian Standards or Appendix E of the International Labour Organization Code.' However, neither the order nor the explanatory statement states which relevant Australian Standards apply in this instance.

The Australian Maritime Safety Authority has advised that this was an oversight and that the Order will be amended as soon as possible to clearly identify the Australian Standards that are to apply. Consistent with the Committee's Guidelines on incorporation, information will be provided as to the manner of incorporation of the standards and how and where the standards may be accessed.

Civil Aviation Safety Instruments

I have sought advice from the Civil Aviation Safety Authority (CASA) about the concerns raised by the Committee in relation to several CASA instruments.

CASA EX166/16 - Exemption—use of radiocommunication system in firefighting operations (Victoria) [F2016L01793]

The Committee noted that the ES for the instrument failed to provide information regarding the nature of consultation undertaken. CASA has advised that the consultation section was inadvertently omitted and a replacement ES has now been registered which includes the information on consultation.

AD/BEECH 300/8 Amdt 3 - Wing Attach Fittings, Bolts and Nuts [F2016L01906]
AD/GAS/1 Amdt 12 - Inspection, Test and Retirement [F2016L01941]
Part 21 Manual of Standards Instrument 2016 [F2016L00915]

In relation to these instruments, the Committee expressed concern that they refer to standards and manuals which cannot be accessed for free. CASA has provided the following advice.

CASA incorporates requirements by reference to reduce the length and complexity of instruments and where there is no value in paraphrasing or reproducing the incorporated material. Examples of documents that CASA instruments incorporate by reference include foreign or privately owned airworthiness standards, standards for non-aviation specific matters (e.g. standards for standard parts like nuts and bolts) that are administered Australian Standards or other standards bodies, CASA policy documents, documents produced by manufacturers of aircraft and operational documents of particular operators. These standards are selected because they promote the safe conduct of the relevant aviation activities. Wherever possible CASA uses freely available standards.

In some cases, CASA may incorporate a purchasable standard as an alternative to a freely available standard, providing choice. If CASA did not provide that choice, then the purchasable standard would not be able to be used to comply with aviation safety requirements even if a person wished to use it. This is the situation with the standards incorporated into the Part 21 Manual of Standards [F2016L00915].

In other cases, particularly in relation to older aircraft no longer supported by the original manufacturer, there are only standards made available for a fee from the manufacturer.

These standards are required in order for those aircraft to remain safe. CASA has no resources to develop its own standards for such aircraft, nor funding to purchase the standards in a way that enables CASA to make the standard freely available. The alternative is for the aircraft to cease to meet safety requirements and to be grounded.

In other cases a standard may relate to a matter that is not aviation-specific. For example, Airworthiness Directive AS/GAS/1 Amdt 12 incorporates by reference Australian Standard 2337.1-2004 relating to the inspection of gas cylinders. There is no aviation-specific standard for this matter and CASA considers that there would be no value in CASA developing such a standard unless aviation-specific risks needed to be addressed. CASA has no expertise in such matters, which are better considered by persons outside the aviation industry. In order to ensure that gas cylinders used in aviation applications are safe, CASA has adopted the Australian Standard and to CASA's knowledge, there is no freely available standard for the same matter.

CASA recognises the importance of the principle of the free availability of legal requirements, including matters such as standards that might be incorporated into law by reference. However, CASA has a limited role in influencing either policy or the law on the issue, particularly in relation to foreign and non-aviation specific standards. For its part, however, CASA will take appropriate steps to ensure that standards are freely available wherever possible, including as an alternative to a purchasable standard in appropriate circumstances.

At the same time, CASA is unable within the scope of its safety mandate under section 9A of the *Civil Aviation Act 1988* to exclude relevant standards on the basis that they are not freely available. To do so would create significant costs and disruption to the aviation industry based on an action that is outside the scope of CASA's functions.

Thank you again for taking the time to write and inform me of your concerns on this matter.

Yours sincerely

DARREN CHESTER

ATTORNEY-GENERAL

CANBERRA

27 FEB 2017

MC17-001242

Ms Toni Dawes
Committee Secretary
Standing Committee on Regulations and Ordinances
PO Box 6100
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Dear Ms Dawes

Thank you for your letter of 9 February 2017 and for the committee's assessment of the Insolvency Practice Rules (Bankruptcy) [F2016L02004] (the instrument). I provide the following advice as requested by the committee.

I note the instrument went through a rigorous targeted consultation process and public consultation process. The concerns raised by the committee were not agitated by stakeholders during the consultation process, with the exception of natural justice, which is discussed in further detail below.

Sub-delegation
I note that the instrument does not alter the Inspector-General in Bankruptcy's current power to appoint a delegate to chair a committee under regulation 8.05A of the Bankruptcy Regulations 1996. Furthermore, this delegation is consistent with the Inspector-General power to, by signed instrument, delegate all or any powers and functions under the *Bankruptcy Act 1966* (see section 11 of this Act).

Part 2 committees would deal with a range of matters, from ordinary trustee registration decisions to more complicated disciplinary matters. I can advise that the Inspector-General's delegate would be an executive-level officer selected on the basis of that they have the appropriate experience and qualifications to chair the committee, in accordance with the Australian Financial Security Authority's internal guidance material. Further guidance around the impartiality of delegates is contained in Inspector-General Practice Statement 8, which is publically available on the Australian Financial Security Authority's website.

Time limit to have administrative decision reviewed
I note that the instrument preserves the existing 60-day time limit for making applications to the court under section 178 of the Bankruptcy Act. This section has been repealed and replaced by section 90-20 of Schedule 2 to the Bankruptcy Act, as amendments were made to group review rights within one division of that Schedule.

The right to review is crucial to ensure individuals affected by trustee decisions have recourse to seek a remedy. However, this right should not be left open-ended. The right to review must be balanced against certainty of decision-making; including a time-limit provides a necessary and appropriate mechanism to balance these competing rights. Specifically, this time limit ensures the outcomes in the administration of bankruptcy have finality for practitioners, debtors and creditors after the expiration of that period. Affected individuals would be made aware of their review rights, and the 60-day time limit, through publically available information on the Australian Financial Security Authority's website.

The role of the Inspector-General should be distinguished from that of the practitioners, debtors and creditors. The Inspector-General has a statutory role in the regulation and enforcement of statutory requirements under the Bankruptcy Act. As part of this role, the Inspector-General may scrutinise the conduct of a registered trustee more broadly, including conduct that may have occurred well before the 60-day timeframe. The relevant court will be able to take into consideration any procedural fairness issues that may arise where the conduct in question occurred well before an application to the court under section 90-20 of Schedule 2 to the Bankruptcy Act.

Part 2 committee proceedings not bound by rules of evidence

It is appropriate for Part 2 committees not to be bound by the rules of evidence as these committees do not operate with the level of formality of other judicial or quasi-judicial bodies. An inquisitorial process is appropriate as committee proceedings do not operate with two or more parties arguing opposing positions but rather a committee considering the position of an individual practitioner, whether for a disciplinary process or for an application to be registered as a practitioner. Further, as the committee acknowledged in its report, Part 2 committee decisions are reviewable by the Administrative Appeals Tribunal.

The issue of procedural fairness was discussed with stakeholders during the consultation process. The issue was closely considered by my departmental officers during the drafting process. In consultation with parliamentary drafters, it was determined that the term 'natural justice' would adequately encompass the principles of procedural fairness and that a reference to both within the instrument may cause confusion. The explanatory statement specifically refers to procedural fairness to clarify this point.

Guidance around the committee process is currently contained in Inspector-General Practice Statements 8 and 13, which are publically available on the Australian Financial Security Authority's website. These practice statements provide more detail on the committee process, including information on conduct of interviews and practitioner's rights to natural justice. These practice statements will be updated to refer to relevant provisions under the instrument and Schedule 2 of the Bankruptcy Act.

Thank you again for writing on this matter.

Yours faithfully

(George Brandis)

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

23 FEB 2017

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Senator Williams

I refer to your letter of 9 February 2017 requesting a response in relation to issues identified in the Senate Standing Committee on Regulations and Ordinances' (the Committee) *Delegated Legislation monitor* No. 1 of 2017 regarding the Insolvency Practice Rules (Corporations) 2016 (Insolvency Practice Rules).

Drafting – compliance with rules for convening and holding a meeting under section 439A of the *Corporations Act 2001*.

I note the Committee's concerns that the requirement for substantial rather than strict compliance with the rules for convening and holding a meeting, in order for the meeting to be valid, may indicate that the relevant provisions have been drafted too broadly. This approach acknowledges that invalidating a meeting would be a severe consequence for a lack of strict compliance, and that it is undesirable to hold a substantively compliant meeting again due to the cost and inconvenience involved for creditors and other affected parties. There are, however, other potential consequences which may flow from an absence of strict compliance with the provisions. Disciplinary action could be pursued against the practitioner involved for a breach of their duties. Affected parties could seek other orders from the Court other than that the meeting was invalid, such as compensation orders or orders that the practitioner is not entitled to remuneration.

Part 2 committee proceedings not bound by rules of evidence

It is appropriate for Part 2 committees not to be bound by the rules of evidence as these committees do not operate with the level of formality of other judicial or quasi-judicial bodies. An inquisitorial process is appropriate as committee proceedings do not operate with two or parties arguing opposing positions but rather a committee considering the position of an individual practitioner, whether for a disciplinary process or for an application to be registered as a practitioner. Further, Part 2 committee decisions are reviewable by the Administrative Appeals Tribunal under Part 9.4A of the *Corporations Act 2001*.

Parliament House, Canberra ACT 2600, Australia
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I note the instrument went through a rigorous targeted consultation process as well as a public consultation process. The issue of procedural fairness was discussed with stakeholders during the consultation process. The issue was closely considered by my departmental officers during the drafting process. In consultation with parliamentary drafters, it was determined that the term 'natural justice' would adequately encompass the principles of procedural fairness and that a reference to both within the instrument may cause confusion. The explanatory statement specifically refers to procedural fairness to clarify this point.

I can advise that Guidance will be issued providing further detail as to committee process, akin to the Practice and Procedures Manuals currently issued for the Companies Auditors Liquidators Disciplinary Board and the practice statements issued on the process for bankruptcy committees.

Delegation of legislative power

Finally, I acknowledge the Committee's view that care should be taken to ensure that key design elements should be appropriately situated in either the Act or the Rules. While I note that the Committee has not requested a response in relation to this aspect of its report, I assure the Committee that careful consideration has been given to which elements of the new disciplinary regime are situated in the Act as opposed to the Rules.

Yours sincerely

Kelly O'Dwyer

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MB17-000080

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

24 FEB 2017

Dear Chair

I refer to the letter dated 9 February 2017 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee), concerning the *Jervis Bay Territory Marine Safety Ordinance (2016)* (the Marine Ordinance) scrutiny issues.

The Committee sought my views about a number of aspects of the Marine Ordinance, including whether the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) should be amended to provide express authority for the creation of offences carrying terms of imprisonment (whether directly in the Acceptance Act or by means of Ordinances made under it); and for justifications where provisions deviate from, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide).

As a general comment, I note that Ordinances made for the external territories and the Jervis Bay Territory (JBT) are quite unlike other types of delegated legislation at the Commonwealth level. Such Ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation. Consequently, deviation from strict compliance with Commonwealth guidance framed in the context of general Commonwealth-level delegated legislation is in some cases justifiable.

Having considered this matter in some detail, at this time I do not think it is necessary to amend the Acceptance Act. I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide more robust justifications in relation to the matters mentioned by the Committee. My response is enclosed.

The Department contact is Steve Dreezer, General Manager, Local Government, Mainland Territories and Regional Development Australia

Thank you for raising this matter.

Yours sincerely

FIONA NASH

Encl

1. Matter more appropriate for Parliamentary Enactment.
Reference Sections: 19, 24, 32, 36, 59, 60, 113

The Jervis Bay Territory (JBT) is a Commonwealth administered territory that has no state legislature. Section 4A of the *Jervis Bay Territory Acceptance Act 1915* (the Acceptance Act) provides that the laws (including the principles and rules of common law and equity) in force in the ACT are, so far as they are applicable to the JBT and are not inconsistent with an Ordinance made under the Act, in force in the JBT as if the JBT formed part of the ACT. Such laws consist of state and local government-type laws made by the ACT Legislative Assembly, which are subject to the scrutiny of the ACT legislature (and apply to the JBT without Commonwealth parliamentary scrutiny).

Section 4F of the Acceptance Act empowers the Governor-General to 'make Ordinances for the peace, order and good government of the Territory'.
In contrast, the Delegated Legislation Monitor (which in turn refers to advice received from the Office of Parliamentary Counsel (OPC) in 2014) refers to a 'general regulation-making power'. As noted in the OPC advice, a 'general regulation-making power' is one that authorises the making of regulations 'required or permitted' or 'necessary or convenient' (see paras 9 to 18 of *Drafting Direction No.3.8—Subordinate Legislation* (DD3.8), which is referred to in the 2014 advice from OPC). Such a law-making power is different in scope from the power to make laws 'for the peace, order and good government' of a territory. The latter is not aptly described as a 'general regulation-making power' as that term is used in the Delegated Legislation Monitor, the 2014 OPC advice or DD3.8. Instead, a power granted in these terms is a plenary power. Although some limits apply to such a power, a grant of power in these terms includes the power to prescribe offences that are punishable by imprisonment.

Ordinances are made by the Governor-General under section 4F of the Acceptance Act to complement the ACT laws that are applied in the JBT (which mainly pertain to state or local government-type issues). Such Ordinances are generally made to account for the JBT's unique legal and administrative arrangements or to address matters, which may not be dealt with by ACT laws applied in the JBT. The established practice to address such legislative gaps is to base any new Ordinance on relevant NSW law, given the proximity of the JBT to NSW.

In practice, the Ordinance-making power under the Acceptance Act is rarely used. Over the past 101 years, only six primary Ordinances have been made in respect of the JBT, three are modelled on NSW legislation (which include offence provisions).

In relation to the Marine Ordinance, the ACT does not have a coastal marine environment to regulate so there is no ACT coastal marine law that applies in the JBT. The policy goal behind the making of the Marine Ordinance is to put in place a legal regime covering use of the JBT marine environment similar to that applying across the JBT-NSW maritime border. The Marine Ordinance offence provisions and penalties mirror those in the *Marine Safety Act 1998* (NSW). The *Marine Safety Act 1998*, including its penalty provisions, were scrutinised by the elected NSW legislature.

Other recent JBT Ordinances have been made which mirror NSW legislation, namely the *Jervis Bay Territory Rural Fires Ordinance 2013* and the *Jervis Bay Territory Emergency Management Ordinance 2015*. These Ordinances also replicate the offence provisions in the mirrored NSW legislation, and carry penalties of imprisonment.

In summary, JBT Ordinances generally apply state-type law and are a rarely used tool. Offence provisions and penalties mirror NSW requirements to provide similar protections on both sides of a contiguous border. Penalties of imprisonment are exceptional, and engaged only for the most serious offences including endangering life. The *Marine Safety Act 1998* (NSW) was scrutinised by the elected NSW legislature.

For the reasons set out above, I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more rigorous justification for the provisions of the Ordinance that provide for penalties in excess of 50 penalty units and or terms of imprisonment.

2. Insufficient information regarding strict liability

Subsections: 87(6) and 105(4) and section 113

I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more comprehensive justification for the three strict liability offence created by these sections, addressing the matters set out in, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide*. As noted in 1. above, these justifications are that:

- the Marine Ordinance is a state-type law;
- JBT has a contiguous border with NSW;
- strict liability provisions mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side of a contiguous marine border between the JBT and NSW;
- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

3. Evidential burden of proof on the defendant

Sections: 108 and 110 and subsections 15(2); 28(2); 41(2); 47(4); 71(1) and (2); and 105(5)

I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the reversal of the burden of proof contained in each of the provisions above, addressing the matters set out in the Guide each of the detailed sections. As noted at 1. above the justifications are that:

- the Marine Ordinance is a state-type law;
- JBT has a contiguous border with NSW;
- Offence provisions reversing the evidentiary burden of proof mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side the contiguous marine border between the JBT and NSW;
- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

4. Legal Burden of Proof on the Defendant

Sections 56 and 63

I have instructed my Department to amend the explanatory statement for the Marine Ordinance to provide a more robust justification for the section 63 requirement for defendants to positively prove the matters set out in that section. As noted at 1. above, these justifications are that:

- the Marine Ordinance is a state-type law;
- JBT has a contiguous border with NSW;
- offence provisions and penalties mirror those of the *Marine Safety Act 1998* (NSW), which regulates marine safety in NSW waters, thus ensuring the same legal regime applies on either side of the contiguous marine border between the JBT and NSW;
- the *Marine Safety Act 1998* (NSW), against which the Marine Ordinance provisions were framed was scrutinised by the elected NSW legislature; and
- the Marine Ordinance is subject to the scrutiny of the Commonwealth legislature.

5. Unclear Definition

Section 92

I note the matters raised by the Committee and I have asked my Department to amend the explanatory statement for the Marine Ordinance to clarify:

- whether the class of person who may assist police officers is limited in any way;
- if the exemptions for police officers that are provided for in sections 109 and 110 apply to persons assisting police officers;
- whether the conduct of persons assisting police officers can be questioned in the same manner as the conduct of police officers; and
- how these provisions would operate if 'persons assisting police officers' acted not in accordance with the directions of the police officers.

6. Access to documents

Subparagraph 21(2)(b)(i)

Australian Standard AS1799.1-2009 Small Crafts Part One (AS1799.1-2009), sets out requirements for maximum load, person and power capacities and for reserve buoyancy, stability, fire protection, testing of power boats and other safety aspects of craft up to 15 metres in overall length when used as recreational vessels. Australian Standard *AS1799.1-2009 is* readily available, but at a cost to the public.

Vessels cannot be registered in the JBT and they must meet the registration conditions set in their home state. Due to the proximity of NSW, the majority of vessels using JBT waters are likely to be registered in NSW. Further, it is likely that most vessels operating in JBT waters will traverse NSW regulated waters. In order to be registered and/or operate in NSW waters vessel operators must comply with regulation 13 of the *Marine Safety Regulations 2016* (NSW), which makes similar provision, to section 21 of the Marine Ordinance.

Section 21 of the Marine Ordinance prohibits a vessel operating in JBT waters from having a motor that exceeds the appropriate power rating for the vessel. In most cases, the

appropriate power rating is specified for the vessel by the manufacturer. However, where there is no power rating specified (or the specification is not apparent) and the vessel has an outboard motor, the appropriate power rating is to be calculated in accordance with section 2.6 of AS 1799.1-2009.

Noting the comments above, I have instructed my Department to paraphrase this response to address the Guide's requirement to include incorporated documents in the Explanatory Statement.

ATTORNEY-GENERAL

CANBERRA

MC17-001239

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600
<regords.sen@aph.gov.au>

Dear Chair Wacka

Thank you for the Senate Regulations and Ordinance Committee (the Committee) letter of 9 February 2017, sent on behalf of the Committee by the Committee Secretary, Ms Toni Dawes.

The letter advised of comments by the Committee in the *Delegated legislation monitor 1 of 2017* concerning the *Migration Amendment (Review of the Regulations) Regulation 2016* and the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016*. Advice from the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, about the issues you have raised is included in my response to your request for further information.

The Committee has sought further advice on the broader justification for the exemption of the *Migration Regulations 1994* from sunsetting and information about the review process for the Migration Regulations.

The purpose of the sunsetting regime established by the *Legislation Act 2003* is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.

The Legislation Act does not specify any conditions or legal criteria that I am required to consider in granting a sunsetting exemption. However, there is a long standing principle that sunsetting exemptions should only be granted where the instrument is not suitable for regular review under the Legislation Act. This principle is underpinned by five criteria:

- the rule-maker has been given a statutory role independent of the Government, or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;
- commercial certainty would be undermined by sunsetting;
- the instrument is part of an intergovernmental scheme; and
- the instrument is subject to a more rigorous statutory review process.

I am satisfied that the review requirement inserted in the Migration Regulations provides a rigorous review process that meets the objective of ensuring that the Migration Regulations are kept up to date and are only in force for as long as they are needed. It enables the objectives of the Legislation Act to be met without incurring the significant systems, training and operational costs associated with remaking the Migration Regulations.

The Committee has also sought information about whether a review of the Migration Regulations had commenced in light of the sunsetting date of 1 October 2018 and why, in effect, an additional year is required to conduct the initial review.

I am advised by the Minister for Immigration and Border Protection that the Department has not commenced the review. According to regulation 5.44A of the Migration Regulations, the review is now to commence between 1 July 2017 and 30 June 2018.

Considering the width and breadth of the Migration Regulations, which currently consists of 1478 pages, these timeframes for the initial review were put in place to ensure that adequate resources and time are allocated.

The Committee may be interested to know that the Migration Regulations are amended numerous times each year to update policy settings for the Australian immigration programmes. This has been the case since the Migration Regulations commenced in September 1994. Redundant provisions were removed from the Migration Regulations in 2012. The amendment history of the Migration Regulations is set out in the endnotes and now runs to more than 400 pages.

I trust that this information is of assistance to the Committee.

Yours faithfully

(George Brandis)

Cc: The Hon Peter Dutton MP, Minister for Immigration and Border Protection

01 MAR 2017

The Hon Christian Porter MP
Minister for Social Services

2 MAR 2017

MC17-003150

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Thank you for your letter of 16 February 2017 regarding the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2017*. I appreciate the time you have taken to bring this matter to my attention.

I note the comments provided in the Delegated Legislation Monitor number 2 of 2017, in regards to the *National Disability Scheme (Becoming a Participant) Amendment Rules 2017* [F2017L00088], that the Explanatory Statement does not provide information about the effect of the retrospective commencement on individuals.

In response to the Committee's concerns, I can assure you that no individuals will be disadvantaged by the retrospective commencement of the instrument. Having regarded to subsection 12(2) of the *Legislation Act 2003*, I will submit a revised Explanatory Statement, following consultation with South Australia.

Thank you again for bringing this matter to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-004469

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Room S1.111
Parliament House
CANBERRA ACT 2600

13 MAR 2017

Dear Chair John

I refer to your letter of 9 February 2017 noting the Senate Standing Committee on Regulations and Ordinance's comments that Explanatory Statements for: the National Health (Paraplegic and Quadriplegic Program) Special Arrangement Amendment Instrument 2016 (No.3) (PB 102 of 2016) [F2016L01930] (PQ Instrument) and, the National Health (Listed drugs on F1 or F2) Amendment Determination 2016 (No.11) (PB 104 of 2016) [F2016L01833] (PB Determination) raised questions about compliance with the requirements of the *Legislation Act 2003*. I now provide a reply to those queries.

The *National Health (Paraplegic and Quadriplegic Program) Special Arrangement 2010 (PB 118 of 2010)* applies to 'pharmaceutical benefits' specified in it (see s 4). The amendment made by the PQ Instrument was the removal of the listing of the Microlax brand of sorbitol with sodium citrate and sodium lauryl sulfoacetate (and the consequential removal of the 'responsible person' code for Johnson & Johnson Pacific Pty Limited) with effect from 1 December 2016. It is noted that the brand name Microlax sorbitol with sodium citrate and sodium lauryl sulfoacetate was also removed from the Pharmaceutical Benefits Schedule on 1 December 2016. Accordingly, from 1 December 2016 the Microlax brand of sorbitol with sodium citrate and sodium lauryl sulfoacetate had not been a 'pharmaceutical benefit' to which the Special Arrangement could apply. The retrospective amendment merely removed the redundant listing.

In any event, the Commonwealth is not aware of any person who was disadvantaged by the retrospective commencement of this instrument. Further, in accordance with subsection 12(2) of the *Legislation Act 2003*, to the extent that as a result of the retrospective commencement of the PQ Instrument did affect the rights of a person (other than the Commonwealth) so as to disadvantage them, or impose liabilities on them in respect of anything done before that day, it would not apply to that person.

As requested in *Delegated Legislation Monitor 1 of 2017*, the Explanatory Statement for the PB Determination will be updated (as per the **attached**) and the Federal Register of Legislation updated. All future applicable Explanatory Statements will follow the Committee's advice. The Explanatory Statements for those Pharmaceutical Benefits instruments referenced in *Delegated Legislation Monitor 2 of 2017* will also be updated.

Yours sincerely

Greg Hunt

EXPLANATORY STATEMENT

National Health Act 1953

National Health (Listed drugs on F1 or F2) Amendment Determination 2016 (No. 11)

PB 104 of 2016

Authority

This Instrument, made under subsection 85AB(1) of the *National Health Act 1953* (the Act), amends the *National Health (Listed drugs on F1 or F2) Determination 2010* (PB 93 of 2010) (the Principal Determination).

The Principal Determination provides for the allocation of drugs to the F1 and F2 formularies of the Pharmaceutical Benefits Scheme (PBS).

Purpose

The Act provides that listed drugs may be assigned to formularies identified as F1 and F2. F1 is intended for single brand drugs and F2 for drugs that have multiple brands, or are in a therapeutic group with other drugs with multiple brands. Drugs on F2 are subject to the provisions of the Act relating to first new brand statutory price reductions, price disclosure and guarantee of supply.

Section 84AC of the Act provides that a drug is on F1 or F2 if there is a determination in force under section 85AB that the drug is on F1 or F2.

Subsection 85AB(1) of the Act empowers the Minister (or delegate) to determine by legislative instrument that a listed drug is on F1 or F2. For a drug to be on F1, it must satisfy the criteria in subsection 85AB(4). This requires that there are no listed brands of pharmaceutical items that have the drug that are bioequivalent or biosimilar, and no listed brands of pharmaceutical items that have another drug in the same therapeutic group as the first drug that are bioequivalent or biosimilar. It also requires that the drug was not on F2 the day before the determination comes into effect. A drug may only be determined to be on F2 if it does not satisfy one or more of the criteria for F1 (subsection 85AB(3)).

When subsection 85AB(5) of the Act applies, which relates to listed drugs with a single brand combination item on the PBS, the listed drug is not placed on F1 or F2, but on the administrative combination drug list.

This Instrument (the Amending Determination) amends the Principal Determination by adding three new drugs – evolocumab, lenvatinib and ocriplasmin to F1and removes the drug homatropine from F1 as this drug is no longer PBS listed. It also moves five currently listed drugs – aripiprazole, bivalirudin, entecavir, itraconazole and rivastigmine from F1 to F2. In addition, it also moves two currently listed drugs – olmesartan with amlodipine and olmesartan with hydrochlorothiazide from the single brand Combination Drug List (CDL) to F2.

Variation and revocation

Unless there is an express power to revoke or vary PB 93 of 2010 cited in this Instrument and explanatory statement, subsection 33(3) of the *Acts Interpretation Act 1901* is relied upon to revoke or vary PB 93 of 2010.

Consultation

The Amending Determination affects pharmaceutical companies with medicines listed on the PBS. Before drugs are listed and allocated to formularies, there are detailed consultations about the drug with the intended responsible person, and a recommendation is received from the Pharmaceutical Benefits Advisory Committee (PBAC). Any PBAC recommendation is made following receipt of submissions by affected pharmaceutical companies. Two-thirds of the PBAC membership is from the following interests or professions: consumers, health economists, practising community pharmacists, general practitioners, clinical pharmacologists and medical specialists. Further consultation on the Amending Determination was deemed unnecessary due to the consultations with affected pharmaceutical companies on allocation of the drugs to formularies having already taken place.

The Amending Determination Instrument commences on 1 December 2016.

This Instrument constitutes a legislative instrument for the purpose of the *Legislation Act 2003*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Health (Listed Drugs on F1 or F2) Amendment Determination 2016 (No. 11) (PB 104 of 2016)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument is made pursuant to subsection 85AB(1) of the *National Health Act 1953* (the Act), which relates to listed drugs on F1 or F2. This Instrument amends the Principal Instrument which provides for the allocation of drugs to the F1 and F2 formularies of the Pharmaceutical Benefits Scheme (PBS).

This Instrument (the Amending Determination) amends the Principal Determination by adding three new drugs – evolocumab, lenvatinib and ocriplasmin to F1 and removes the drug homatropine from F1 as this drug is no longer PBS listed . It also moves five currently listed drugs – aripiprazole, bivalirudin, entecavir, itraconazole and rivastigmine from F1 to F2. In addition, it also moves two currently listed drugs – olmesartan with amlodipine and olmesartan with hydrochlorothiazide from the single brand Combination Drug List (CDL) to F2.

Human rights implications

This Legislative Instrument engages Article 2 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) by assisting with the progressive realisation by all appropriate means of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

The PBS is a benefit scheme which assists with advancement of this human right by providing for subsidised access by patients to medicines. The recommendatory role of the Pharmaceutical Benefits Advisory Committee (PBAC) ensures that decisions about subsidised access to medicines on the PBS are evidence-based.

Conclusion

This Legislative Instrument is compatible with human rights. Human rights continue to be protected by retaining on the PBS clinically important medicines and placing them in formularies that ensure the most cost effective pricing for supply of each medicine to Australians.

Louise Clarke
Assistant Secretary, Pharmaceutical Evaluation Branch,
Pharmaceutical Benefits Division, Department of Health

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
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CANBERRA ACT 2600

Delegated Legislation Monitor 1 of 2017

John

Dear Chair

Thank you for your letter of 9 February 2017 on behalf of the Senate Standing Committee on Regulations and Ordinances about the Radiocommunications (Spectrum Licence Allocation – 700 MHz Band) Determination 2016 (the Determination) as set out in the Delegated Legislation Monitor 1 of 2017.

The Determination sets out the procedures that the Australian Communications Media Authority (ACMA) must adhere to for the allocation of spectrum licences in the upcoming auction for the residual 700 MHz band.

The ACMA has provided me with advice in relation to the Committee's concerns. It is the ACMA's practice to appoint an ACMA employee as the auction manager, and it is the practice of the auction manager to delegate their powers only to ACMA employees or members, who are subject to the *Public Service Act 1999*. The auction manager is appointed as a principal point of contact for applicants and bidders in the auction process, and as a principal person responsible for the conduct of the auction.

The auction manager performs several functions and powers under the Determination which are procedural or mechanistic, and are necessary for the timely, orderly and efficient conduct of the auction. The Determination sets out the processes that the auction manager must adhere to in conducting the auction, including setting the start date and time for the first and second rounds of the auction or cancelling the auction in exceptional circumstances. If the auction manager were taken ill during the auction, subsequent rounds or processes could not take place in the absence of delegated functions and powers. As it is not possible to predict when a substitute auction manager will be required, the ACMA has not limited the powers which may be delegated to a substitute auction manager.

I would also like to acknowledge that the Committee has drawn to my attention the resolution of the matter in relation to the Radiocommunications (Emergency Locating Devices) Classs Licence 2016.

If the Committee would like further information in relation to these matters the relevant contact in my Department is Ms Kate Feros who can be contacted on 02 6271 1737 or kate.feros@communications.gov.au.

Thank you for bringing these matters to my attention. I trust this information will be of assistance.

Yours sincerely

MITCH FIFIELD

24/2/17

THE HON KAREN ANDREWS MP
ASSISTANT MINISTER FOR VOCATIONAL EDUCATION AND SKILLS

Our Ref MC17-000497

Ms Toni Dawes
Committee Secretary
Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
CANBERRA ACT 2600

1 MAR 2017

Dear Secretary

I refer to the Committee's request for advice on the *Student Identifiers (Exemptions) Amendment Instrument 2016* [F2016L02003] (the Instrument), which was registered on 21 December 2016.

The Instrument was created under section 53(3) of the *Student Identifiers Act 2014* which allows for exemptions from the requirement to only issue a Vocational Education and Training (VET) qualification or statement of attainment to an individual who has been assigned a student identifier. Instruments under section 53(3) are made by the Commonwealth Minister following agreement with the Ministerial Council.

The purpose of the exemption for single-day courses was to recognise issues that may arise where enrolment, course delivery, assessment and issuing of qualifications all occur on the same day. This leaves limited time to resolve issues with identity verification, which is an important element in the student identifiers scheme. The exemption was initially intended to expire on 31 December 2015, but was extended for a further year after feedback from affected training providers, to give them more time to adjust their business processes to the student identifier requirements, for example by modifying their enrolment procedures to collect student identifiers in advance of the course.

I and all skills ministers from states and territories agreed to the extension of the exemption for a further 12 months because the exemption is currently part of a wider review of VET data collection arrangements. The review of the *National VET Provider Collection Data Requirements Policy* (VDR Policy) includes all current reporting exemptions relating to the collection of VET data. Term of Reference 3 of the review relates to "The effectiveness, suitability and impact of all current (and any proposed) exemptions for collecting and reporting Total VET Activity and Unique Student Identifier (USI) data". This USI exemption is one of six exemptions and concessions being considered in the review.

The review is being conducted by the Australian Government Department of Education and Training on behalf of all skills ministers and is expected to be considered by ministers in mid-2017. More information about the review is available at: submissions.education.gov.au/Forms/VETDP/pages/index.

Should a decision be taken through the review to continue this exemption, appropriate steps will be taken to implement the decision in accordance with the *Student Identifiers Act 2014*.

I trust the above addresses the concerns of the Committee. If you require further information please contact Ms Kelly Fisher, Branch Manager, VET Market Information Branch on 02 6240 2569.

Yours sincerely

Karen Andrews MP